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Supreme Court of the United States

ISMAEL JOHN, JACKSON ADING, JAMES GIDEON, KUNEO JOSEPH, HARRY JACKSON, BOAZ DAVID, SAM LEVAI, BALIKEN JACKSON, DAVID OBET, KOSIMA JOHANNES, JINET LANGRUS, EBEL JOSEPH, GEORGE YOSHITARO, ISAHO LUTHER, BIKENJI PAUL, NEPTALI PETER, AND MOSES ABRAHAM, FOR THEMSELVES AND FOR A CLASS CONSISTING OF THE PEOPLE OF ENEWETAK,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners represent the people of Enewetak Atoll in the Marshall Islands, a former trust territory of the United States. The people of Enewetak were removed from their homes and deprived of their property for more than thirty years so that the United States could conduct atomic-weapons testing there. Petitioners pursued claims for just compensation in the federal courts, but their cases were dismissed when the United States and the Marshall Islands government entered into an agreement that those claims should be resolved by an alternate tribunal. That tribunal awarded petitioners more than $385,000,000 in compensation, but the United States has failed to pay more than a token amount. Petitioners renewed their efforts to seek just compensation from the United States in federal court, but the Federal Circuit ruled that petitioners' constitutional takings claims were jurisdictionally barred by the agreement between the U.S. and the Marshall Islands, and that under the political question doctrine the court could not examine the validity of what it referred to as that agreement's "settlement" and "espousal" of those claims.

The questions presented are:

1. Whether Congress validly barred the courts of the United States from exercising jurisdiction over petitioners' constitutional claims for just compensation.

2. Whether, under the political question doctrine, the court of appeals could not even consider petitioners' contention that the jurisdictional bar is not valid as a "settlement" or "espousal" of petitioners' claims.

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The opinion of the United States Court of Federal Claims (App. 11a) is reported at 77 Fed. Cl. 788. The opinion of the United States Court of Appeals for the Federal Circuit (App. 1a) is reported at 554 F.3d 996.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. A timely petition for rehearing was denied on May 27, 2009. On July 28, 2009, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 24, 2009, and on September 14, 2009, the Chief Justice further extended the time for filing to October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES

1. The Fifth Amendment to the United States Constitution provides in relevant part: "...nor shall private property be taken for public use, without just compensation."

2. The following are set forth in the appendix:

a. The Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (App. 117a);

b. The Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association (App. 261a); and

c. The Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947) (App. 281a).

STATEMENT

This case presents an issue essential to the security of all property owners: whether the government may evade the constitutional guarantee of just compensation for the taking of private property by stripping the courts of jurisdiction over any claim that it has not provided just compensation for the taking. In the decision below, the Federal Circuit ruled that it had been deprived of statutory jurisdiction to entertain petitioners' constitutional claims for just compensation, notwithstanding this Court's decisions stressing that the constitutional requirement of just compensation for a taking is self-executing and that it is for the judiciary to decide whether compensation for a taking is constitutionally adequate. The Federal Circuit further suggested that petitioners' constitutional claims were barred by a "settlement" and refused to examine the validity of that settlement under the "political question" doctrine, even though petitioners themselves never entered into any such settlement and the only agreement to dismiss petitioners' claims was between the United States government and one of its own territories. Without this Court's review, the government will have effectively insulated itself from the fundamental constitutional requirement that it pay just compensation for the taking of property.

A. The U.S. Government Removes The People Of Enewetak From Their Property

Petitioners are inhabitants of Enewetak Atoll, one of several atolls and islands making up the Marshall Islands, located in the central Pacific Ocean. Enewetak Atoll includes 40 islands and encloses a lagoon of roughly 388 square miles. C.A. App. 79, 86 (¶¶17, 39).

The Marshall Islands were occupied by the United States during World War II. Together with the rest of Micronesia, in 1947 the Marshall Islands were brought into the United Nations trusteeship system with the United States as administering authority. The Trusteeship Agreement gave the United States "full powers of administration, legislation, and jurisdiction" over the Trust Territory. App. 282a-283a (Art. 3). It also recognized, in Article 6, that the United States bore fiduciary obligations to the people of the Trust Territory to "protect the inhabitants against the loss of their land and resources" and to safeguard their "rights and fundamental freedoms." App. 284a. The Trusteeship Agreement further recognized the Marshallese as U.S. nationals, providing that the United States "shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority." App. 287a (Art. 11).

Shortly thereafter, the United States government identified the Marshall Islands as sites for atomic weapons testing. In December 1947, the government removed all of the people of Enewetak from their homes and transferred them to Ujelang Atoll, the most isolated of the inhabited atolls in the Marshall Islands.[1] Despite government assurances that their forced removal would be temporary, the people of Enewetak spent the next 33 years on Ujelang. During that time,

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[1] The government also removed the inhabitants of the Bikini Atoll to another island so that it could conduct atomic weapons tests on Bikini. The residents of Bikini have brought a case similar to this one, and in the same opinion that disposed of the Enewetak case, the Federal Circuit disposed of the Bikini case. The Bikini plaintiffs have filed a separate petition for certiorari.

their only contact with the rest of the world was through infrequent visits from supply ships, and they suffered (in the words of the Interior Department) "grave privations, including periods of near starvation." C.A. App. 95-98 (¶¶63-75); *see also* App. 329a (decision of Nuclear Claims Tribunal) (noting that petitioners had undergone "famine and hunger, near starvation and death from illness, food shortage and the limitations of the environment on Ujelang (fishing/collecting), the polio epidemic, the measles epidemic, [and] the rat infestation").

Between April 1948 and August 1958, Enewetak was the site of 43 atomic and hydrogen bomb tests, which devastated the islands and lagoon, left massive amounts of radioactive material on them, and contaminated much of the Atoll. During the 1960s and 1970s, Enewetak was also used for missile testing, which scattered toxic beryllium over one of the Atoll's principal islands. C.A. App. 98-100 (¶¶76-82).

In 1972, the United States announced that it would return Enewetak Atoll to its people. In October 1973, the Atomic Energy Commission published a radiation survey and proposed a nuclear cleanup operation for the Atoll. From 1972 to 1977, various federal agencies engaged in studies and planning for radiological cleanup and rehabilitation programs. From May 1977 to April 1980, the government attempted to remediate Enewetak Atoll. C.A. App. 102-103 (¶¶89-91). In October 1980, the people of Enewetak were finally permitted to return. C.A. App. 103 (¶91). Much of the Atoll, however, remains uninhabitable, and some of it was completely vaporized by the weapons testing. *See* App. 290a.

B. The People Of Enewetak Seek Just Compensation In The Federal Courts

In September 1982, the people of Enewetak brought an action in the Claims Court seeking compensation for the taking of the Atoll and stating claims for the breach of an implied-in-fact contract. The Claims Court dismissed the takings claim as time-barred,[2] but declined to dismiss one of the contract claims. *See Peter* v. *United States*, 6 Cl. Ct. 768 (1984).

While that suit was pending, the United States and the government of the Marshall Islands—over which the United States at that time retained control as trust administrator—negotiated a Compact of Free Association ("Compact"). The Compact recognized the Republic of the Marshall Islands (RMI) as self-governing in some respects, but retained for the United States "full authority and responsibility for security and defense matters in or relating to the Marshall Islands." App. 222a-223a (§ 311(a)). Congress approved the Compact in a joint resolution (the "Compact Act") in December 1985, the President signed the Compact Act in January 1986, and the Compact took effect on October 21, 1986. *See* Pub. L. No. 99-239, 99 Stat. 1770 (1986); C.A. App. 86 (¶38); App. 117a-260a.

In Section 177(a) of the Compact, the United States "accept[ed] the responsibility for compensation owing to citizens of the Marshall Islands ... for loss or damage

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[2] The people of Enewetak appealed the Claims Court's conclusion that this claim was untimely. Separate Brief of Appellants, *People of Enewetak* v. *United States*, No. 88-1208 (Fed. Cir. Apr. 15, 1988). The Federal Circuit affirmed the Claims Court on other grounds, and did not address the question of timeliness. *People of Enewetak* v. *United States*, 864 F.2d 134, 136 n.4 (Fed. Cir. 1988).

to property and person ... resulting from the nuclear testing program." 99 Stat. 1812, App. 204a. Section 177(b) provided for the United States and the Marshall Islands government to enter into a separate agreement (the "Section 177 Agreement") for several purposes, including the "just and adequate settlement" of all "claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise." *Id.*

The "Section 177 Agreement" between the United States and the Marshall Islands government terminated all jurisdiction in United States courts over the Marshall Islanders' claims based on nuclear testing and channeled all such claims to an alternative tribunal, the Nuclear Claims Tribunal (NCT). The NCT was empowered to "render final determination upon all claims ... which are based on, arise out of, or are in any way related to the Nuclear Testing Program," including claims for injury, death, and damage to property. App. 271a (Art. IV, § 1(a)). The Section 177 Agreement designated $45.75 million for "whole or partial payment" of NCT awards. App. 267a (Art. II, § 6(c)).

Article X of the Section 177 Agreement, titled "Espousal," provided that the Agreement "constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program ... including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions." App. 276a-277a. Article XII, titled "United States Courts," provides that "[a]ll claims described in Articles X and XI of this Agreement shall be

terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed." App. 278a. Section 103(g)(1) of the Compact Act contains similar provisions, *see* 99 Stat. 1782, App. 144a ("any such claims shall be terminated and barred except insofar as provided for in the Section 177 Agreement"), and Congress expressly "ratified and approved" the Section 177 Agreement in Section 103(g)(2) of the Compact Act, 99 Stat. 1782, App. 144a.[3]

In light of the Compact, the Compact Act, and the Section 177 Agreement, the Claims Court determined that Congress had withdrawn its jurisdiction over the Enewetak people's claims, but left open the possibility that they could return to court to challenge the adequacy of the compensation received through the NCT process. *Peter* v. *United States*, 13 Cl. Ct. 691, 692 (1987). The Federal Circuit affirmed the dismissal of the Enewetak claims solely on the ground that the Section 177 Agreement withdrew all federal court jurisdiction over those claims and channeled them into the alternative tribunal. *People of Enewetak* v. *United States*, 864 F.2d 134, 136 (Fed. Cir. 1988). The Federal Circuit concluded that "appellants' attack on the 'adequacy' of the alternative procedure provided by Congress for compensation of their claims was *premature*" and that it was "unpersuaded that judicial intervention is appropriate *at this time* on the mere speculation that the alternative remedy may prove to be inadequate." *Id.* (emphases added).

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[3] Section 175 of the Compact also states that the Section 177 Agreement "shall have the force of law." 99 Stat. 1812, App. 203a.

C. The People Of Enewetak Seek Just Compensation In The Alternative Tribunal

In 1990, the people of Enewetak filed a claim in the NCT, as provided for by the Section 177 Agreement. C.A. App. 111 (¶122). Over ten years later, the NCT issued a final decision awarding $385,894,500, of which $244 million was for the past and future loss of Enewetak Atoll, $107.81 million was for restoration costs for a radiological cleanup of the Atoll, and $34,084,500 was for hardships suffered as a result of the forced relocation to Ujelang. C.A. App. 113-118 (¶¶128-146). The award included an offset for prior compensation paid by the United States. C.A. App. 116 (¶141).

In 2002 and 2003, the NCT paid the people of Enewetak a total of $1,647,483. That amount represents less than 1% of their actual award. The NCT has not made a payment since February 2003, and has exhausted the $45.75 million earmarked in the Section 177 Agreement. C.A. App. 119 (¶¶148-151). In January 2003, former Attorney General Richard Thornburgh prepared a report on the NCT in which he concluded that "the $150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands." C.A. App. 120 (¶¶152-154).

Article IX of the Section 177 Agreement provides that the Marshall Islands government may petition Congress for additional funds for the NCT based on changed circumstances. App. 276a. The Marshall Islands government presented a "changed circumstances" petition to Congress in September 2000, seeking additional funds principally based on new radiation standards adopted by the United States that lowered the recommended level of exposure. C.A. App. 120-124

(¶¶155-164). In January 2005, the State Department recommended rejection of the petition. Congress has taken no action to date. C.A. App. 125 (¶¶166-168).

D. The People Of Enewetak Return To The Federal Courts To Seek Just Compensation

In light of Congress's manifest failure to provide the residents of Enewetak with just compensation for their property, petitioners filed suit in the Court of Federal Claims in 2006. Two counts of the complaint seek to revive the original claims for the taking of Enewetak and for breach of implied contract that were brought in 1982 but were dismissed on the assumption (which proved illusory) that Congress had created an adequate alternate tribunal. Two other counts seek just compensation for the taking of those original taking and contract claims, based on the fact that Congress diverted those claims into the NCT process but then failed to provide adequate funding for the NCT award.[4] The Court of Federal Claims dismissed all of the counts on various grounds. App. 77a-96a.

The Federal Circuit affirmed the dismissal. The panel concluded that Congress had deprived it of jurisdiction to entertain the Enewetak people's claims, including their takings claims, despite Congress's manifest failure to provide more than token funding for those claims. The court also held that the Section 177

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[4] A fifth count, based on the taking of Enewetak, similarly alleges that the NCT process into which the underlying claims were diverted failed to provide constitutionally adequate compensation, and a sixth seeks damages for breach of fiduciary duties created by an implied-in-fact contract for just compensation established in the Compact Act and its related agreements.

Agreement constituted an unreviewable "settlement" of petitioners' claims related to nuclear testing in the Marshall Islands, even though petitioners were not party to any such settlement. App. 7a, 9a.

In concluding that it lacked statutory jurisdiction to hear petitioners' claims, the court found controlling and unambiguous language in the Section 177 Agreement directing that "[n]o court of the United States shall have jurisdiction to entertain such claims" (relating to the atomic testing programs). App. 6a-8a. Even though this Court has stressed that the constitutional guarantee of just compensation is self-executing and that Congress may not set arbitrarily low ceilings on the amount of compensation due for such takings, *see Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 368 (1936); *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 327 (1893), the Federal Circuit still found that its jurisdiction over petitioners' takings claims had been withdrawn, and it declined to construe the Section 177 Agreement in a manner that would have avoided the constitutional question raised by such a ruling. App. 8a.

The Federal Circuit also noted that "this case involves a settlement negotiated between the United States and the Government of the Marshall Islands." App. 9a. Although petitioners are not parties to any settlement of their claims against the United States, the court stated that "[t]he power to conduct foreign relations includes ... the authority to enter into an international claims settlement on behalf of nationals." *Id.* (citing *United States* v. *Pink*, 315 U.S. 203 (1942)). The court also referred to the "settlement" of petitioners' claims as an "espousal" of those claims (between the U.S. and Marshall Islands governments) and ruled that "the validity of that espousal ... raises a political

question beyond the power of this or any court to consider." *Id.* (again citing *Pink*). The court reached that conclusion even though, when the Marshall Islands government entered into the Section 177 Agreement with the United States, it was not a foreign sovereign but remained under the control of the United States. Finally, the court remarked that, although "its sense of justice, of course, makes it difficult to turn away from a case of constitutional dimension," nonetheless "this court cannot act without jurisdiction," and "this court cannot hear, let alone, remedy a wrong that is not within its power to adjudicate." *Id.*

REASONS FOR GRANTING THE PETITION

More than 100 years ago, this Court remarked that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 324 (1893). This case demonstrates the enduring wisdom of that observation. Petitioners, deprived completely of the use and enjoyment of their ancestral lands for more than 30 years, have sought only the just compensation for that taking to which the Fifth Amendment entitles them. The government has responded by providing only token payment for petitioners' property—less than one percent of its true value—and has precluded petitioners from seeking any judicial remedy for the remainder.

The Federal Circuit's decision—that Congress may bar the courts from entertaining constitutional claims for just compensation—cannot be correct. At a minimum, that decision raises grave constitutional questions fundamental to the protection of property rights,

which could and should have been avoided through statutory construction. The Federal Circuit's decision is all the more important because that court has exclusive jurisdiction over appeals from decisions of the Court of Federal Claims, *see* 28 U.S.C. § 1295(a)(3), which in turn has exclusive jurisdiction under the Tucker Act over virtually all claims that the United States has taken property without just compensation, *see id.* § 1491(a)(1). Absent review by this Court, the Federal Circuit's conclusion that Congress can by statute bar judicial consideration of a constitutional just compensation claim will effectively be the last word.

The court of appeals' decision is no less problematic because it concluded that the jurisdictional bar was based on a "settlement" or "espousal," the validity of which it declined to examine as a "political question." That reasoning itself raises serious constitutional concerns and warrants this Court's review. Petitioners never signed any settlement with the United States; the only relevant agreement was one between the United States government and an entity then under its control, the Marshall Islands government. To rule, as the Federal Circuit did, that the validity of this supposed "espousal" is nonjusticiable is to hold, in effect, that the United States government may insulate itself from constitutional claims by negotiating with its own dependency. This Court's review is warranted to make clear that the Fifth Amendment's command of just compensation may not be evaded in this manner.

I. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CONGRESS MAY NOT STRIP THE COURTS OF JURISDICTION OVER CONSTITUTIONAL TAKINGS CLAIMS

A. The Right To Just Compensation May Not Be Eliminated By Statute

The Constitution requires the United States to pay just compensation whenever it takes private property for public use. U.S. Const. amend. V ("...nor shall private property be taken for public use, without just compensation"). This Court has never suggested that the government may avoid that constitutional command by refusing to pay the full amount of just compensation due and barring the courts from enforcing its obligation to do so. To the contrary, this Court has made clear that "[t]he just compensation clause may not be evaded or impaired by *any form* of legislation." *Baltimore & Ohio R.R Co.* v. *United States*, 298 U.S. 349, 368 (1936) (emphasis added).

This Court has repeatedly stressed that the right to just compensation arises from the Constitution itself. That right requires no additional statutory enactment and admits no possibility of statutory nullification. "Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 304 (1923). It is not even necessary for the government to waive sovereign immunity for the courts to entertain just compensation claims, for it has long been recognized that the constitutional requirement of just compensation is "self-executing." *See First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 315 (1987); *United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *see also Jacobs* v. *United States*, 290 U.S. 13, 16 (1933) ("Statutory recognition was not

necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment."). "[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *First English*, 482 U.S. at 315 n.9.

Just as Congress may not eliminate the protections of the Just Compensation Clause directly, it may not do so indirectly by jurisdiction-stripping. The government may not cloak itself with immunity for its unconstitutional actions by barring judicial review of that conduct. This Court has frequently recognized this principle when it has cautioned against any reading of a statute that would deprive the courts of authority over constitutional claims. *See, e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974); *see also Graham & Foster* v. *Goodcell*, 282 U.S. 409, 431 (1931) (stressing that, if "Congress did not have the authority" to reach a particular substantive result, "it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy").

Other courts of appeals have recognized that the government may not insulate its unconstitutional conduct through jurisdictional bars. "In considering the constitutional issue, it is important to recall that, in the entire history of the United States, the Supreme Court has never once held that Congress may foreclose all judicial review of the constitutionality of a congressional enactment." *Bartlett* v. *Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987). Thus, when presented with that very question, the D.C. Circuit had "little doubt that such a limitation on the jurisdiction of *both* state and federal courts to review the constitutionality of federal legislation ... would be [an] unconstitutional infringement of

due process." *Id.* at 703 (internal quotation marks omitted; alterations in original).

Similarly, the First Circuit has observed that, while Congress has "the power to regulate the jurisdiction of the lower federal courts ... and the Supreme Court has not found constitutional difficulties in congressional abrogation of certain remedies *as long as others are left intact* .... Congress probably cannot nullify rights guaranteed in the Constitution by prohibiting all remedies for the violation of those rights." *Aguilar* v. *Immigration & Customs Enforcement Div.*, 510 F.3d 1, 17-18 (1st Cir. 2007) (emphasis added). And the Second Circuit has stressed that "the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation." *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948); *see also Arreola-Arreola* v. *Ashcroft*, 383 F.3d 956, 963 (9th Cir. 2004), *overruled on other grounds by Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007) (en banc).

This Court has also long made clear that, "when [a property owner] appropriately invokes the just compensation clause, he is entitled to a *judicial* determination of the amount." *Baltimore & Ohio R.R. Co.*, 298 U.S. at 368 (emphasis added). Although Congress may require claimants to pursue their claims for just compensation in the first instance before an alternate tribunal, property owners have the right, under the Constitution, to seek a judicial remedy should the compen-

sation awarded by that tribunal be inadequate. Thus, this Court has long insisted that Congress may not fix the amount that a property owner will receive in compensation and has reserved that determination for the courts. "The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Nav. Co.*, 148 U.S. at 327; *see also St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51-52 (1936).

Under these settled principles, the federal courts were obligated to take jurisdiction over petitioners' claims. The United States government took petitioners' property, and they were entitled to just compensation for it. Although Congress formally acknowledged the responsibility of the United States to compensate petitioners for the taking of their property, *see* pp. 5-6, *supra*, and although Congress set up an alternate tribunal in which petitioners might present their claims for compensation, the government has refused to make any provision for payment of that tribunal's award beyond a token amount. The government's refusal to pay compensation to petitioners, combined with its decision to bar the courts of the United States to petitioners, surely constitutes a violation of the Fifth Amendment no less than the government's refusal to pay interest on a compensation award, *see Jacobs*, 290 U.S. at 17, or its refusal to pay for one of the sticks in the bundle of rights that it has taken, *see Monongahela Nav. Co.*, 148 U.S. at 328-329 (right to collect tolls).[5]

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[5] The government argued in the Federal Circuit that petitioners could not invoke the Just Compensation Clause because this case supposedly involves foreign-owned property located outside the United States. Gov't C.A. Br. 51-58. The court of appeals

B. The Court Of Appeals Could, And Should, Have Avoided The Constitutional Question Here Through Statutory Construction

The court of appeals' decision that Congress permissibly closed the courts to petitioners' constitutional takings claims is all the more unfortunate because the Federal Circuit could easily have avoided such a ruling.

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did not address that contention, which is clearly wrong. First, several petitioners have U.S. citizenship. Second, the people of Enewetak were U.S. nationals when they were removed from their property in 1947, when they first presented their federal claims for the taking of their property, and when the Section 177 Agreement terminated their takings claims pending in the U.S. courts in 1986. Enewetak was under U.S. jurisdiction at all of those times. At a minimum, therefore, petitioners have a substantial connection to the United States that allows them to invoke the Just Compensation Clause—as the Claims Court previously held. *See Juda* v. *United States*, 6 Cl. Ct. 441, 458 (1984); *see also Nitol* v. *United States*, 7 Cl. Ct. 405, 415 (1985) (citing *Juda* and noting that "[i]t was there concluded that the just compensation clause of the Fifth Amendment would extend to include a taking that resulted from the United States nuclear testing program in the Marshall Islands."); *cf. Atamirzayeva* v. *United States*, 524 F.3d 1320, 1328-1329 (Fed. Cir. 2008) ("In *Juda* and *Nitol*, the court found that the plaintiffs were covered by the just compensation clause ... based on the 'unique relationship' between the United States and the Trust Territory Government and the relationship between the United States and the plaintiffs."). Third, at the very outset of the trusteeship period, the United States acknowledged its obligation to extend constitutional rights. *See* Memorandum for the President, David E. Lilienthal (Nov. 25, 1947), C.A. App. 143-144 ("[T]o insure that the United States meets fully its international obligations under the Charter of the United Nations and in connection with the Trusteeship Agreement ... special provisions will be made for local inhabitants as follows: 1. They will be accorded all rights which are the normal constitutional rights of citizens under the Constitution, but will be dealt with as wards of the United States for whom this country has special responsibilities.").

This Court has repeatedly made clear that interpretations that call into question the constitutionality of an Act of Congress are to be avoided if at all possible. "[I]f a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided, a court should adopt that construction." *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979).

That principle of avoiding constitutional questions has particular force when the jurisdiction of the federal courts is at stake. *See INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001). Even when interpreting statutes with seemingly sweeping limitations on jurisdiction, this Court has adopted interpretations preserving jurisdiction over constitutional questions. *See Weinberger* v. *Salfi*, 422 U.S. 479, 762 (1975); *Johnson* v. *Robison*, 415 U.S. at 366-367. And specifically in the context of the Just Compensation Clause, the Court has stressed that congressional enactments should not be interpreted as barring a claimant's judicial remedy whenever a reading preserving that remedy is possible. *See Preseault* v. *ICC*, 494 U.S. 1, 11-17 (1990); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-136 (1974).

Had the court of appeals heeded these principles, it readily could have avoided a reading of the Section 177 Agreement that precludes jurisdiction over petitioners' claims. Although the court of appeals dismissed concerns about constitutional avoidance by insisting that "[t]he language of the Section 177 Agreement presents no ambiguities whatsoever" (App. 8a), in fact, the statutory language at issue here is no more clear-cut than language that has elsewhere been found not to deprive federal courts of jurisdiction over constitutional claims. Article XII of the Section 177 Agreement provides that "[a]ll claims *described in Articles X and XI of this Agreement* shall be terminated," and that "[n]o court of

the United States shall have jurisdiction to entertain *any such claims*[.]" App. 278a (emphasis added). Article X, in turn, refers to all claims "which are based upon, arise out of, or are in any way related to the Nuclear Testing Program." App. 276a.

Several of petitioners' claims, however, do not "arise out of," and are not "based on" or "related to," the Nuclear Testing Program itself.[6] Rather, they arise from the government's failure to provide adequate funding to pay the NCT's award to petitioners—an award made after petitioners in good faith invoked the alternate remedy provided by Congress, presented their case to that tribunal, and received a decision that they were entitled to compensation for the decades-long loss of their property. Petitioners' claims based on the nuclear testing program were presented to and decided by the NCT, which determined that those were valid, compensable claims. What petitioners seek now in Counts III, IV, and V of their complaint is not compensation for the government's taking of their *land* during the nuclear testing program, but compensation for the government's taking of their *claims*, decades after the nuclear testing program ended, when the government closed the federal courts to those claims and refused to pay the NCT's award.

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[6] "Related to" is broad terminology, but it is not unlimited. *See N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). That is especially true where, as here, it is used in conjunction with two other, narrower terms ("based on" and "arising out of") and thus presumably was intended to share their characteristics. *See, e.g., United States* v. *Williams*, 128 S. Ct. 1830, 1839-1840 (2008).

This case thus resembles the *Regional Rail Reorganization Cases*, where the Court considered whether two sets of provisions in the Regional Rail Reorganization Act ("Rail Act") took the property of certain railroads' creditors and, if so, whether they were entitled to seek compensation in the Court of Claims under the Tucker Act for any constitutional deficiency in the compensation they received through a special process set up under the Rail Act. The Court concluded that the Rail Act did not deprive the creditors of an ultimate Tucker Act remedy, in significant part because "[t]here are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself." 419 U.S. at 134; *see also id.* at 149.

Moreover, two circuits—including the Federal Circuit itself—previously indicated that the language at issue here would allow the people of Enewetak and others similarly situated to return to the federal courts to challenge the adequacy of the compensation received through the alternative process. *See People of Enewetak*, 864 F.2d at 136; *Antolok* v. *United States*, 873 F.2d 369, 378 (D.C. Cir. 1989) ("If there is an uncompensated or inadequately compensated taking, then plaintiffs' remedy is in the Claims Court.").

The court of appeals' reading also places the Section 177 Agreement in conflict with itself. Section 177 of the Compact—the very provision that the Section 177 Agreement is designed to implement—not only unambiguously assigns responsibility for the loss or dam-

age to property to the United States government,[7] but explicitly states that the purpose of the Section 177 Agreement is to provide for "the just and adequate settlement of all such claims which have arisen." Compact § 177(b), App. 204a. The interpretation of Article XII adopted by the court of appeals thus undermines the central purpose of Section 177. The court should have rejected an interpretation of an agreement that is irreconcilable with the congressional purpose behind it. *See Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001).

II. THE GOVERNMENT CANNOT AVOID JUDICIAL CONSIDERATION OF PETITIONERS' CONSTITUTIONAL CLAIMS BY INVOKING THE POLITICAL QUESTION DOCTRINE OR LABELS SUCH AS "SETTLEMENT" OR "ESPOUSAL"

There is some indication in the Federal Circuit's decision that it viewed the Section 177 Agreement as comprising not just a jurisdictional bar but also a "waiver" or "settlement" of petitioners' claims. *See* App. 8a (stating that the Section 177 agreement "represents not only the United States' removal of its consent to be sued in the courts over these claims but also the claimants' waiver of their right to sue over these claims in any U.S. court."). The court of appeals also relied on the fact that Article X of the Section 177 Agreement labeled the bar to petitioners' claims an "espousal." *See* App. 9a. The court declined to question the "validity of that espousal" under the political question doctrine. *Id.*

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[7] "The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands ... for loss or damage to property and person of the citizens of the Marshall Islands." Compact § 177(a), App. 204a.

This reasoning cannot justify a bar to judicial consideration of petitioners' current claims. Petitioners were not parties to the settlement supposedly reflected in the Section 177 Agreement, and to read that Agreement as precluding petitioners from pursuing their just compensation claims now would be contrary to the "deep-rooted historic tradition that everyone should have his own day in court." *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989) (internal quotation marks omitted). Moreover, the government cannot avoid the constitutional questions raised by the jurisdictional bar to petitioners' constitutional claims by placing the label of "espousal" on that bar and declaring it immune from scrutiny under the political question doctrine. "No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts." *INS* v. *Chadha*, 462 U.S. 919, 941-942 (1983). To hold otherwise, as the court of appeals did, is to rule that the U.S. government may permanently insulate itself from constitutional claims by negotiating a settlement of such claims with another government, even if it is the government of one of its own territories, and even if the U.S. government never intends to honor that settlement.

A. The Jurisdictional Bar Cannot Be Upheld As A Waiver Or Settlement Of Petitioners' Claims

There is no question that parties can compromise their constitutional claims in litigation, *see Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), but that is not what happened in this case. Rather, at a time when it was under the control of the United States government

and seeking independence, the Marshall Islands government agreed with the United States government to bar United States courts from hearing those claims. This abrogation of petitioners' claims, in an agreement between the U.S. government and an entity under its control and supervision, does not solve the constitutional problems in this case; if anything, it exacerbates them.

First, the notion that petitioners' takings claims could be waived or settled by someone other than themselves, especially a governmental entity, is highly doubtful. "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party[.]" *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986); *cf. Taylor* v. *Sturgell*, 128 S. Ct. 2161 (2008) (rejecting "virtual representation" theory of preclusion). Although some cases have suggested that a governmental entity litigating in a *parens patriae* capacity can dispose of "the common *public* rights" of its citizens, *see City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958) (emphasis added), no decision of this Court suggests that a government may negotiate away personal, individual rights to seek redress in the courts of the United States for constitutional violations.

Second, even if in some circumstances a governmental entity could "waive" its citizens' constitutional claims, the position of the Marshall Islands government at the time of the Section 177 Agreement makes it impossible to conclude that such a "waiver" here could be valid. Only *sovereign* entities may prosecute civil litigation in a *parens patriae* capacity that would be binding on their citizens. *See City of Rohnert Park* v. *Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979). The Marshall Islands government was not sovereign when it pur-

portedly negotiated away the rights of the residents of Enewetak. Although the Marshall Islands at that time had been granted a modicum of self-government, it remained under the control of the United States government as part of the Trust Territory of the Pacific Islands, for which "all executive, legislative, and judicial authority" was vested in "such agency or agencies as the President of the United States may direct or authorize." 48 U.S.C. § 1681(a). Given these circumstances, the jurisdictional bar to petitioners' constitutional claims erected by the Section 177 Agreement between the United States and Marshall Islands governments cannot be upheld under the transparent fiction that *petitioners* ever agreed to settle their claims against the United States.

B. The Jurisdictional Bar Is Not Immune From Judicial Review Under The Political Question Doctrine

The court of appeals also stated that the political question doctrine barred it from considering the validity of the preclusion of petitioners' constitutional claims. App. 9a. In so concluding, the court noted that Article X of the Section 177 Agreement refers to the jurisdictional bar as an "espousal."[8] *Id.* The court also

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[8] It is doubtful that the concept of espousal has any relevance here. Espousal is a concept of inter-sovereign relations in international law. It is the mechanism by which one sovereign state exercises its right of diplomatic protection of its nationals by asserting (and in some cases settling) "the private claims of its nationals against another sovereign." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); *see also Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981) ("International agreements settling claims by nationals of one state against the government *of another* 'are established international practice re-

stated that "[t]he power to conduct foreign relations includes the power to recognize a foreign sovereign and the authority to enter into an international claims settlement on behalf of nationals." *Id.*

That statement is unexceptionable by its terms, but it has no bearing on this case. Petitioners are not challenging the United States government's recognition of the Republic of the Marshall Islands. Nor does this case involve a situation in which the United States arranged for the disposition of claims that its citizens were pursuing against a foreign sovereign. Rather, in this case, petitioners are challenging the United States government's attempt to dispose of *constitutional* claims that had been brought against it—and that had been brought against it by people who were nationals of the United States.

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flecting traditional international theory.'" (quoting Louis Henkin, *Foreign Affairs and the Constitution* 262 (1st ed. 1972)) (emphasis added)). When the Section 177 Agreement was negotiated, the Marshall Islands' relation to the United States was not that of a foreign sovereign. *See, e.g.*, *People of Saipan* v. *Department of Interior*, 356 F. Supp. 645, 653, 655 (D. Haw. 1973) (Article 3 of the Trusteeship Agreement allows the United States "in practical effect the exercise of full sovereign power."), *aff'd*, 502 F.2d 90 (9th Cir. 1974); *World Communications Corp.* v. *Micronesian Telecommunications Corp.*, 456 F. Supp. 1122, 1123-1124 (D. Haw. 1978) (holding that Trust Territory of the Pacific Islands was not a foreign state for purposes of diversity jurisdiction statute). Rather, the Marshall Islands remained under the control of the United States, although with limited rights of self-government. Indeed, the Trusteeship Agreement recognized the Marshallese as U.S. nationals at this time, providing in Article 11 that the United States "shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority." App. 287a.

For those reasons, *United States* v. *Pink*, 315 U.S. 203 (1942), on which the court of appeals relied, is inapposite. *Pink* involved a claims-settlement agreement between the United States and the Soviet Union in which the U.S. was seeking to protect its claims and the claims of U.S. nationals "against *Russia or its nationals.*" *Id.* at 227 (emphasis added); *see also Medellin* v. *Texas*, 128 S. Ct. 1346, 1371 (2008) (noting that *Pink* "involve[d] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals"). Moreover, the U.S. government's recognition of the Soviet Union was directly relevant because that recognition retroactively validated the Soviet Union's nationalization of property, from which the United States' own claims derived. *See Pink*, 315 U.S. at 223. No Fifth Amendment problem arose in *Pink* because the private claimants opposed to the United States' assertion of ownership over a Russian company's U.S. property pursuant to an assignment from the Soviet government had no Fifth Amendment rights in the property they were claiming. They were merely foreign creditors of the Russian company whose claims did not arise from the transactions of its New York branch. The effect of the United States' acceptance of the Soviet government's nationalization and assignment was merely to permit the use of the Russian company's U.S. property to satisfy American claims against Russia for other nationalizations, leaving the foreign creditors of the Russian company to seek satisfaction by other means. *See id.* at 226-228; *id.* at 228 ("[T]he Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors.").

The question in *this* case, by contrast, is whether the United States government may bar its courts from reviewing the constitutionality of its own actions by securing the agreement of another government (here, the Marshall Islands) to that bar. Whatever the answer is, that question is surely a legal one and not a "political" one.[9] "'Courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.'" *Chadha*, 462 U.S. at 943 (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). This is particularly true in the context of the Fifth Amendment's guarantee of just compensation, which, this Court has held, is ultimately a matter for judicial, not political, enforcement. *See* pp. 15-16, *supra*.

This Court has never suggested that constitutional claims against the United States for just compensation in the wake of a claims-settlement agreement would be nonjusticiable. To the contrary, in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), where the petitioner argued that the President's suspension of claims against Iran in U.S. courts constituted a taking requiring just compensation, the Court did not even intimate that

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[9] Moreover, the answer is clearly "no." This Court has made clear that the political Branches cannot use international agreements to render the Constitution inapplicable where it would otherwise apply. *See Boumediene* v. *Bush*, 128 S. Ct. 2229, 2258-2259 (2008). "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 16 (1957). The takings context is no different; indeed, as discussed above, the Fifth Amendment mandates that claimants have the opportunity to challenge in federal court the adequacy of the compensation received for a taking.

such takings claims would be barred by the political question doctrine, but rather stated that "we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Id.* at 687-688; *see also id.* at 691 (Powell, J., concurring in part and dissenting in part) ("The Government must pay just compensation when it furthers the nation's foreign policy goals by using as bargaining chips claims lawfully held by a relatively few persons subject to the jurisdiction of our courts."). Moreover, the Court addressed on the merits the petitioner's attempt to enjoin the President from implementing a portion of the Algiers Accords that required dissolution of attachments obtained against Iranian assets, and that forced the petitioner to pursue compensation for claims against Iran before a claims-settlement tribunal. *See id.* at 668-688. *Dames & Moore* thus makes clear that the political question doctrine presents no obstacle to the resolution of the constitutional claims presented here.

That the political question doctrine poses no obstacle follows, not just from the Fifth Amendment's commitment of just compensation issues to judicial resolution, but also from the limited scope of the political question doctrine itself. Not "every case or controversy which touches on foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Indeed, even in circumstances touching far more directly on the political Branches' authority to conduct foreign and military affairs, the Court has not found a political question impediment to the adjudication of constitutional questions associated with governmental attempts to appropriate property. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *see also Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931). The fact that this case involves an agreement

between the U.S. government and the government of the Marshall Islands does not render the constitutional issues in this case immune from judicial consideration. Not only was the Marshall Islands a U.S. Trust Territory when the Compact and Section 177 Agreement were negotiated, but courts frequently determine the meaning and legal effect of treaties and other international agreements. *See, e.g., Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 353-354 (2006) (determining the meaning of treaties as a matter of federal law is a judicial responsibility); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[T]he courts have the authority to construe treaties and executive agreements."); *Reid* v. *Covert*, 354 U.S. 1 (1957) (assessing constitutionality of trials of civilians before courts-martial conducted pursuant to international agreements with Great Britain and Japan).[10]

Regardless of the terminology used to describe the agreement between the governments of the United States and the Marshall Islands in which the latter

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[10] The political question doctrine is inapplicable here for a further reason: Congress clearly contemplated that courts would scrutinize the "espousal" provision in Article X when considering whether the Section 177 Agreement validly extinguished petitioners' claims. Section 103(g)(2) of the Compact Act makes clear that the espousal in Article X and the withdrawal of jurisdiction in Article XII of the Section 177 Agreement stand or fall together. *See* 99 Stat. 1782, App. 144a ("the jurisdictional limitations set forth in Article XII [of the Section 177 Agreement] are not to be construed or implemented separately from Article X"); *see also Antolok*, 873 F.2d at 387-390 (Wald, C.J., concurring). By inviting courts to address the issue, Congress indicated that the issue is amenable to judicial resolution, and that it did not view judicial resolution of the issue as an encroachment on the authority of the political Branches.

government acquiesced in the United States' jurisdiction-stripping, the legal effect of that agreement is governed by the Fifth Amendment, which the federal courts have the power to interpret and enforce. Whether the Compact and the Section 177 Agreement can defeat petitioners' right to a judicial determination of just compensation—or whether, by contrast, the Fifth Amendment prohibits the United States from denying an ultimate judicial determination regardless of whatever non-party may have consented to the denial—is at base a question about what the Fifth Amendment guarantees. This is the type of question that the Constitution commits to the courts for resolution, and the Federal Circuit erred in refusing to address it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 2007-5175, 2007-5176

THE PEOPLE OF BIKINI, BY AND THROUGH THE KILI/BIKINI/EJIT LOCAL AND GOVERNMENT COUNCIL,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ISMAEL JOHN, JACKSON ADING, JAMES GIDEON, KUNIO JOSEPH, HARRY JACKSON, BOAZ DAVID, SAM LEVAI, BALIKEN JACKSON, DAVID OBET, KOSIMA JOHANNES, JINET LANGRUS, EBEL JOSEPH, GEORGE YOSHITARO, ISAHO LUTHER, BIKENJI PAUL, NEPTALI PETER, AND MOSES ABRAHAM, FOR THEMSELVES AND FOR A CLASS CONSISTING OF THE PEOPLE OF ENEWETAK,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

January 29, 2009

[554 F.3d 996]

* * *

[997]

Before LOURIE, RADER, PROST, Circuit Judges.

RADER, Circuit Judge.

The people and descendants of the Bikini and Enewetak Atolls seek just compensation for the taking of their land and their legal claim by the United States government. The Nuclear Claims Tribunal has awarded, but not completely funded, compensation for the Atolls' inhabitants due to bomb testing in the 1940s and 1950s. Because the parties clearly and unambiguously agreed to extinguish any judicial jurisdiction over the claims presented in these appeals, this court affirms the United States Court of Federal Claims' dismissal of these complaints.

I.

The Court of Federal Claims sets forth the background of this dispute in great detail. *See People of Bikini v. United States*, 77 Fed. Cl. 744 (2007); *John v. United States*, 77 Fed. Cl. 788 (2007). Accordingly, this opinion will only discuss those facts necessary for these appeals. The Bikini and Enewetak Atolls are two of twenty-nine atolls and five islands comprising the Marshall Islands. In December 1947, the United States selected these Pacific Ocean atolls as sites for the Nuclear Testing Program. The United States removed the inhabitants of these islands from their homes. Many refugees suffered deprivations in their new conditions. Meantime the weapons testing programs devastated the islands and lagoon, scattering massive amounts of radioactive material.

The Plaintiffs-Appellants represent the people and descendants of the Bikini and Enewetak Atolls. In the early 1980s, both groups filed claims in the United States Court of Claims. The Plaintiffs sought just compensation for the Fifth Amendment taking of their land and damages for the United States' breach of its fiduci-

ary duties. During this litigation, the governments of the United States and the Marshall Islands reached a settlement agreement to compensate the refugees and victims. The United States presented this Compact of Free Association to Con-[998]gress in 1984. The Compact of Free Association Act of 1985 (the Compact Act) became law on January 14, 1986. Pub. L. No. 99-239, 99 Stat. 1770 (1986). Section 177(a) of the Compact Act sets forth the United States' acceptance of responsibility for the damage to property and persons resulting from the Nuclear Testing Program. Section 177(b) provides for the settlement of all claims past, present and future that are based upon, arise out of, or are in any way related to the Nuclear Testing Program. The United States and the Government of the Marshall Islands entered into a further agreement to implement Section 177 of the Compact Act—the Section 177 Agreement—on October 21, 1986. The Compact Act specifically references and incorporates the provisions of the Section 177 Agreement into the Compact Act. Compact Act, § 103(g). In view of the Compact Act and the Section 177 Agreement, the successor to the Court of Claims, the United States Claims Court, held that the United States' consent to be sued under the Tucker Act had been withdrawn with respect to the pending takings claims and dismissed. *Juda v. United States*, 13 Cl. Ct. 667 (1987).

The Section 177 Agreement created a Nuclear Claims Tribunal to render final determination upon all "past, present and future" claims related to the Nuclear Testing Program. Congress committed $150 million to initiate a trust fund to support the Tribunal's operations and awards. Section 177 Agreement, Art. I, § 1. Congress designated $45.75 million of that amount for the payment of awards. *Id.* at Art. II, § 6(c). Even

from its inception, many critics recognized that the Tribunal fund would not satisfy all of the claims.

On August 3, 2000, the Tribunal awarded the Plaintiffs-Appellants, the People of Enewetak, $385,894,500, including $244,000,000 for past and future loss of Enewetak Atoll, $107,810,000 for restoration costs and radiation cleanup, and $34,084,500 for hardships suffered during the relocation from the atoll. In February 2002 and 2003, the Tribunal paid only $1,078,750 and $568,733 on those awards—less than 1% of their total award.

In March 2001, the Tribunal awarded the Plaintiffs-Appellants, the People of Bikini, $563,315,500 in compensation, including $278,000,000 for the past and future loss of their land. Due to inadequate funding, however, the Tribunal paid only $1,491,809 in 2002, recognizing that the fund is "insufficient to make more than a token payment." The fund made a second payment of $787,370.40 in 2003, approximately 0.4% of the total award. As of October 2006 only $1 million remained in the Tribunal fund.

Article IX of the Section 177 Agreement provides an avenue for seeking additional funding from Congress. A "Changed Circumstances" petition can be submitted to Congress if "such injuries render the provisions of this Agreement manifestly inadequate." Section 177 Agreement, Art. IX. Article IX goes on to say that it "does not commit the Congress of the United States to authorize and appropriate funds." *Id.* The Government of the Marshall Islands submitted a Changed Circumstances petition to Congress requesting additional funding in 2000. To date, Congress has not acted on that petition.

In 2006, the Plaintiffs-Appellants brought suit in the United States Court of Federal Claims seeking just compensation for deprivation of property rights under the Fifth Amendment. The Plaintiffs based their takings claims on inadequate funding of the Tribunal's award programs (claims-based taking) and the deprivation of their land during the testing (land-based taking). Before the United States Court of Federal Claims, the Appellants also as-[999]serted various contract and implied contract theories.

The Court of Federal Claims granted the Government's motion to dismiss primarily because the Section 177 Agreement deprives any court of the United States of jurisdiction over these claims. The trial court also observed that nonjusticiable political questions, ripeness doctrines, statute of limitations bars, collateral estoppel bars, and other deficiencies in the claim prevented any grant of relief. The Appellants timely appealed to this court. On appeal, this court received only the land-based and claims-based taking claims.

II.

This court reviews the dismissal of a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims without deference. *See Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004); *Shearin v. United States*, 992 F.2d 1195, 1195 (Fed. Cir. 1993).

The Section 177 Agreement states: "This Agreement constitutes the *full settlement* of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program . . . ." Section 177 Agreement, Art. X

(emphasis added). This enacted Agreement has the force of law. Compact Act, § 175.

Addressing the "United States Courts," Article XII of the settlement agreement instructs, "All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed.*" Section 177 Agreement, Art. XII (emphasis added). Article XII thus represents the parties' agreement to extinguish any judicial power to hear these claims.

This court proceeds from the vantage point that constitutional rights and "wrongs," if at all possible, deserve a forum for hearing and relief in the U.S. judicial system. At the same time, this court acknowledges that its first obligation is to ensure that it has power and authority to hear a claim, even a constitutional claim, in the first place. *See Ex parte McCardle*, 74 U.S. 506, 512 (1868) ("The first question necessarily is that of jurisdiction.").

To be specific, the United States Constitution divides power between the legislative, executive, and judicial branches. Judicial power is vested in one Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. 3, § 1. By "ordain," the Constitution meant to give the legislature the power to set the jurisdiction and the limits of judicial authority for the "inferior Courts." In addition, the legislative authority to establish the inferior courts includes the power to limit their jurisdiction and powers. Because Congress "ordain[s] and establish[es]" all courts under the Supreme Court, the legislative authority includes the power to

set their jurisdiction. And just as Congress can grant jurisdiction, Congress can take it away. *See Ex parte McCardle*, 74 U.S. at 514 ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Thus, before proceeding to hear any claim, even a constitutional claim, this court must ensure that it has jurisdiction to act.

The Section 177 Agreement is a settlement agreement. By its own terms, it **[1000]** constitutes "the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program." Section 177 Agreement, Art. X, § 1. As part of the agreement, the Government of the United States committed $150 million to the fund, setting aside $45.75 million for the payment of monetary awards rendered by the newly created Nuclear Claims Tribunal.

On appeal, the parties do not contest the amount awarded by the Nuclear Claims Tribunal. Rather they seek enforcement of the award—in spite of the Claims Tribunal's award of amounts beyond the funding limits of the settlement agreement. Moreover the parties contemplated the prospect of inadequate funding for full compensation when entering into the Section 177 Agreement. In the event that "such injuries render the provisions of this Agreement manifestly inadequate," Article IX provides an avenue for submitting a changed circumstances petition to Congress.

The "Changed Circumstances" provision acknowledges that "this Article does not commit the Congress

of the United States to authorize and appropriate funds." Section 177 Agreement, Art. IX. The parties expressly agreed to this procedure and in doing so trusted the U.S. Congress to weigh and evaluate and act upon any changed circumstances. Thus, the settlement agreement entrusted the funding remedy to a procedure outside the reach of judicial remedy.

Indeed on that point, the language of the settlement agreement is clear: "All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed.*" Section 177 Agreement, Art. XII (emphasis added). This statement represents not only the United States' removal of its consent to be sued in the courts over these claims but also the claimants' waiver of their right to sue over these claims in any U.S. court. Thus, this court has no authority in this matter, except to dismiss for lack of jurisdiction.

This case does not present any statutory ambiguities about the jurisdiction or, actually, the absence of jurisdiction to entertain the Bikini and Enewetak taking claims. This court notes that, in *Blanchette*, the Supreme Court refused to resolve ambiguities in the statute about Tucker Act jurisdiction to avoid encountering "grave doubts" about the constitutionality of the Rail Act itself. *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974). This court does not need to engage in any caution due to ambiguities. The language of the Section 177 Agreement presents no ambiguities whatsoever. Therefore, this court does not need to follow the careful course of the *Blanchette* case.

Moreover, unlike the *Blanchette* case, this case involves a settlement negotiated between the United States and the Government of the Marshall Islands. The power to conduct foreign relations includes the power to recognize a foreign sovereign and the authority to enter into an international claims settlement on behalf of nationals. *See United States v. Pink*, 315 U.S. 203, 229-30 (1942). The Plaintiffs-Appellants, the People of Enewetak, challenge the validity of that espousal. However, that challenge raises a political question beyond the power of this or any court to consider. *Id.* at 229 ("What government is to be regarded here as representative of a foreign sovereign state is a political rath-[1001]er than a judicial question, and is to be determined by the political department of the government." (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137, (1938))).

This court observes that its sense of justice, of course, makes it difficult to turn away from a case of constitutional dimension. However, the same sense of justice recognizes that this court cannot act without jurisdiction. In sum, this court cannot hear, let alone remedy, a wrong that is not within its power to adjudicate. The sweeping language of the Section 177 Agreement withdraws jurisdiction of the U.S. courts. Thus, this court affirms the United States Court of Federal Claims' dismissal of these complaints.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 06-289L

ISMAEL JOHN, *et al.*, FOR THEMSELVES AND FOR A CLASS CONSISTING OF THE PEOPLE OF ENEWETAK,
Plaintiffs,

v.

UNITED STATES,
Defendant-Appellee.

Filed August 2, 2007

[77 Fed. Cl. 788]

OPINION AND ORDER

MILLER, Judge.

This case, a resurrection of proceedings before the court in the late 1980s, is before the court after argument on defendant's dispositive motion. Following the filing of plaintiffs' amended complaint on August 10, 2006, defendant moved to dismiss pursuant to RCFC 12(b)(1) and 12(b)(6). The instant case, along with its companion, *People of Bikini v. United States*, No. 06-288C (Fed. Cl. filed Apr. 11, 2006),[1] puts before the court the nature of the legal responsibility undertaken by the United States for the post-World War II testing

[1] The opinion in the companion case also is issued this date.

of thermonuclear bombs on the island homelands of plaintiffs. This program obliterated or compromised the land and caused the relocation of the islands' inhabitants, who have sought redress in political, judicial, and special-purpose fora over the last sixty years. Argument has been held, and two rounds of supplemental briefing have been completed.[2]

BACKGROUND

Plaintiffs include seventeen persons with land rights on Enewetak who were members of the Enewetak community during their initial evacuation by the United States in December 1947. Pursuant to RCFC 23, plaintiffs bring this suit in the United States Claims Court, now the United States Court [792] of Federal Claims, on their own behalf and on behalf of a class that

> consists of all living persons who were members of the Enewetak community at the time of the 1947 evacuation of Enewetak Atoll, all living descendants of those members, and all other persons who by traditional law and custom are recognized as members of the Enewetak people.... There are currently more than 2000 members of the Enewetak people.

Am. Compl. filed Aug. 10, 2006, ¶ 14. Plaintiffs include a Senator for the people of Enewetak; the Mayor of the people of Enewetak; members of the Enewetak/Ujelang Council; and the Iroji, or chiefs, of the ri-Enewetak; and the ri-Enjebi.

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[2] By order entered on March 28, 2007, this case and *Bikini* were consolidated for purposes of argument only.

Plaintiffs plead six counts against the United States for occupation and use of portions of Enewetak Atoll. Plaintiffs allege: (1) a temporary taking of Enewetak Atoll by the United States between December 1947 and October 1980 and of select portions within Enewetak from October 1980 through the next twenty to fifty years ("Count I"); (2) breach of an implied-in-fact contract formed by the conduct of the United States, which constituted "a commitment to care for [plaintiffs'] physical, economic, educational, cultural, and other needs until it returned their atoll in substantially the condition in which it had received it or paid compensation for any significant changes," Am. Compl. ¶ 192 ("Count II"); (3) a taking of plaintiffs' taking claim for the use and occupation of Enewetak Atoll by the United States in failing to fund the Nuclear Claims Tribunal so as to deny just compensation ("Count III"); (4) an unlawful taking of plaintiffs' property interest manifested in their implied-in-fact contract claim for failure to provide for adequate funding of the Nuclear Claims Tribunal ("Count IV"); (5) a taking of Enewetak Atoll through the formation of the Compact of Free Association in 1986 ("Count V"); and (6) a breach of implied-in-fact contract fiduciary duties through formation of the Compact of Free Association ("Count VI").

FACTS

Judge Kenneth R. Harkins presided over these cases during the 1980s. He labored on them conscientiously and painstakingly for years. The undersigned, a new and young judge at the time, witnessed his dedicated efforts. The United States Court of Appeals for the Federal Circuit acknowledged the thoroughness of Judge Harkins's opinions. Judge Harkins fully addressed the factual backdrop of this case; the Federal

Circuit affirmed his decision, *see People of Enewetak v. United States*, 864 F.2d 134, 135 (Fed. Cir. 1988), *aff'g Peter v. United States*, 13 Cl. Ct. 691 (1987) (also stating facts relevant to plaintiffs' complaint in *Tomaki Juda et al. v. United States*, No 172-81L (Cl. Ct. filed Mar. 16, 1981)); and the parties neither have adduced new facts nor offered insight into the facts of record over the last nineteen years that would change them. This court adopts and restates, with minor modifications, the facts as found by Judge Harkins. *See Peter v. United States*, 6 Cl. Ct. 768, 770-73 (1984) (Enewetak Atoll; granting and denying, in part, motion to dismiss) ("*Peter I*"); *Juda v. United States*, 6 Cl. Ct. 441, 446-49 (1984) (Bikini Atoll; denying motion to dismiss) ("*Juda I*"). The facts subsequent to 1987 are undisputed, except where noted otherwise.

I. Nuclear tests in the Marshall Islands

1. History of the Marshall Islands

During the period June 30, 1946, to August 18, 1958, the United States conducted a series of nuclear tests in the Marshall Islands that included detonation of twenty-three atomic and hydrogen bombs at Bikini Atoll and forty-three atomic and hydrogen bombs at Enewetak Atoll. These tests necessitated removal of the inhabitants and their relocation to other islands and resulted in severe physical destruction at the atolls directly involved, as well as radioactive contamination at other parts of the Marshall island chain. The effects of the testing program included: annihilation of some islands and vaporization of portions of others; permanent resettlement with substantial relocation hardships to some inhabitants; exposure to high levels of radiation by some inhabitants; and widespread contamination

from radioactivity that renders some islands unus[]able by man for indefinite future periods.

[793] The Marshall Islands are a part of Micronesia, formerly a United Nations Trust Territory administered by the United States. The component parts of the Trust Territory of the Pacific Islands (the "Trust Territory") were the Marshall, Caroline, and Mariana island chains. The Trust Territory includes more than 2,000 islands and atolls dispersed throughout the Pacific Ocean, within an area approximately the size of the continental United States.

Until World War II, Micronesia was administered by Japan under a League of Nations Mandate. The islands came under the United States' control by military occupation in 1944. The United Nations and its Trusteeship Council were given jurisdiction over non-self-governing territories, and trusteeship agreements were executed between the United Nations and those signatory powers in de facto possession of such territories.

The United States was designated "administering authority" over the Trust Territory pursuant to an agreement ratified by the United Nations Security Council on April 2, 1947, and approved by Congressional joint resolution on July 18, 1947. 61 Stat. 3301, T.I.A.S. No. 1665. In 1947 military government was terminated, and administration of the Trust Territory was delegated to the Secretary of the Navy. Exec. Order No. 9,875, 3 C.F.R. 658 (1943-48 comp.). In 1951 some administrative responsibilities were transferred to the Interior Department. Exec. Order No. 10,265, 3 C.F.R. 766 (1949-53 comp.). By the Act of June 30, 1954, as amended (48 U.S.C. § 1681 (1982)), Congress directed:

> (a) Until Congress shall further provide for the government of the Trust Territory of the Pacific Islands, all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize.

Prior to 1962 responsibility for administration of the Trust Territory was divided between the Interior and Navy Departments. Effective July 1, 1962, the authority for civil administration of the Trust Territory was redelegated to the Secretary of the Interior, with the direction to carry out the obligations assumed by the United States as the administering authority "under the terms of the Trusteeship Agreement and the Charter of the United Nations." Exec. Order No. 11,021, 3 C.F.R. 600 (1959-63 comp.). *See generally Porter v. United States*, 496 F.2d 583, 587-90 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975). Pursuant to this authority, the Secretary of the Interior established a Trust Territory Government (the "TTG"), which included executive, legislative, and judicial branches, with a High Commissioner as chief executive. Sec. Order No. 2,918, 34 Fed. Reg. 157 (1968).

In 1969 the United States began negotiations with the inhabitants of the Trust Territory directed to establishment of a framework for transition to constitutional self-government and future political relationships. During the negotiations the Trust Territory became divided into four governmental entities: Northern Mariana Islands, Republic of Palau, Federated States of Micronesia, and Republic of the Marshall Islands.

2. Occupation of Enewetak Atoll

Enewetak Atoll is composed of approximately forty islands, which have a combined land area of 2.75 square miles and enclose a lagoon of approximately 388 square miles. The largest islands are Enewetak Island, with a land area of 321.86 acres, and Engebi Island, with a land area of 290.58 acres.

The Enewetak people traditionally have been divided into two separate subcommunities, one on Engebi Island and one on Enewetak Island. Members of the two communities historically have intermarried and cooperated in certain economic activities. They now elect a common council. The Enewetak people are governed by the two chiefs (Iroji) of the subcommunities; a Magistrate; an elected Council of twelve members; a Scribe; and a Senator, who represents the Enewetak people in the legislature of the Marshall Islands government. The people of Enewetak historically were eco-[794]nomically self-sufficient on the basis of lagoon fishing, nonintensive agriculture, and various gathering activities. Beginning in the early 20th century, copra was produced as an export crop.

During February 1944 American troops captured Enewetak Atoll from the Japanese, which at that time had several thousand personnel on Engebi. On February 24, 1944, the military governor posted Proclamation No. 1. This proclamation notified the civilian inhabitants that existing personal and property rights would be respected and existing laws and customs would remain in force and effect, except "to the extent that it is necessary for me in the exercise of my powers and duties to change them."

Later in February 1944, the Enewetak people were relocated to a camp on Aomon Island, an island in the

atoll. Eventually the total civilian population of the atoll was gathered in this camp. The Army unit left on July 4, 1944; thereafter, the Navy, until June 1946, provided all supplies of food, clothing and housing for the Enewetak people. During the period February 1944 to late 1945, the Enewetak people were permitted to reside only on Aomon Island and on the adjacent Bijire Island.

On June 14, 1946, in preparation for the commencement of Operation CROSSROADS, at Bikini Atoll, the entire population of Enewetak Atoll was transported by the Navy to Kwajalein Atoll, where they were housed in temporary facilities and supplied by the Navy. On July 25, 1946, Enewetak Atoll was declared safe; on July 30, 1946, the Enewetak people were returned to Aomon and Bijire Islands at Enewetak Atoll.

During the period of residence at Kwajalein Atoll, United States officials caused the Enewetak people to believe that their removal from Enewetak would be temporary; that they would be able to return to Enewetak at the conclusion of the Bikini nuclear tests; that temporary relocation was necessary to protect them against harm from the tests on Bikini Atoll; and that, throughout the relocation, their needs for food, shelter, and other necessities would be provided by the United States.

On December 1, 1947, Enewetak Atoll was chosen as the site for the nuclear tests in Operation SANDSTONE, and the United States Governor of the Marshall Islands notified the Enewetak people that they must leave the atoll. During December 1947 the entire population, with personal belongings, was boarded on a United States Navy LST and transported to Ujelang

Atoll, where they arrived on December 21, 1947. During the period of their relocation on Ujelang Atoll, United States officials caused the Enewetak people to believe that their removal would be temporary; that they would be able to return to Enewetak at the conclusion of the United States use of Enewetak; that relocation was necessary to protect them against harm resulting from United States operations; and that, throughout the relocation, their needs for food, shelter and other necessities would be provided by the United States.

Ujelang Atoll is the westernmost and most isolated geographically of the inhabited atolls and islands that comprise the Marshall Islands. It lies 124 miles southwest of Enewetak Atoll and 617 miles west of Majuro, the administrative center and the major commercial port for the Marshall Islands. Ujelang Atoll has 0.67 square miles of dry land area and 25.47 square miles of lagoon and is rocky and relatively unproductive for agriculture.

Ujelang resources were inadequate to provide the Enewetak people with a regular supply of food and other material necessities. Infrequent and irregular ship visits resulted in severe shortages of rice, flour, and materials needed to repair buildings and boats. By 1952 most of the Enewetak people's sailing canoes were rendered unus[]able as a result of severe shortage of sailcloth, paint, fishing net material, and hooks. In the mid-1960s, the island's rat population increased greatly and destroyed stored copra and supplies of rice and flour. By 1967 food was so short that the people on Ujelang had only enough for one meal each day.

On October 20, 1967, a TTG ship arrived to find the people on Ujelang with no copra to sell and no money to

buy needed food and supplies. Almost all of the nearly 300 people on the atoll boarded the ship and demanded transport to Majuro to protest to the govern-[795]ment that they were starving. A Trust Territory official, after seven hours, radioed for food and agreed to stay on Ujelang until the supply ship returned. The supply ship returned with food on November 3, 1967.

In November 1968 the people on Ujelang were totally out of rice, flour, sugar, and other imported goods. In June 1972 a typhoon destroyed the breadfruit crop, and on August 30, 1972, a supply ship found that the Enewetak people had been out of rice, flour, sugar, and canned meat for over two weeks.

The nuclear program on Enewetak Atoll extended from April 1948 to August 1958 and included forty-three atomic and hydrogen bomb tests. The program included Operation SANDSTONE (April and May 1948), Operation GREENHOUSE (April and May 1951), Operation IVY (November 1952), Operation REDWING (May through July 1956), and Operation HARDTACK (May through August 1958). The nuclear tests at Enewetak Atoll included detonations in the air, on towers, on the surface of islands and reefs, on barges, and underwater. Two plutonium tests on the island of Runit, as a result of failure to fully detonate, sprayed chunks of plutonium across the island. On August 22, 1958, the President of the United States announced a suspension of further atmospheric testing of nuclear weapons to take effect on October 31, 1958.

The Nuclear Testing Program resulted in serious damage to Enewetak Atoll. Five islands were completely or partially vaporized. Islands on the northern half of the atoll, including Engebi and Runit, were contaminated heavily with radioactivity; radioactive

wreckage littered many of the islands. The lagoon was damaged seriously. Vegetation was completely stripped from many islands, and almost all plants of agricultural and economic value on the atoll were totally destroyed.

On November 5, 1956, the two hereditary chiefs, and a majority of the Enewetak people who possessed rights in the atoll, were assembled on Ujelang to discuss a settlement of past and future use of the atoll. On November 19, 1956, the High Commissioner of the TTG as one party and the two hereditary chiefs—twenty-four individuals of Enewetak and twenty-four individuals of Engebi—as the other parties executed a document captioned: "Agreement in Principle Regarding the Use of Enewetak Atoll." This document provided that the TTG would grant and convey to the Enewetak people full use rights in Ujelang atoll to continue "until such time as it may be possible for the people to return to Enewetak." The TTG was given full use rights to Enewetak Atoll "until such time as it will not be necessary to occupy and use Enewetak Atoll in the interest of the maintenance of international peace and security." The sum of $175,000 was to be conveyed to persons who possess rights in Enewetak, to be administered as follows: $25,000 paid at the time of signing to be divided by the hereditary chiefs and the remaining $150,000 to be placed in a trust fund administered by the High Commissioner. Section 5 of the document contained an assertion that the chiefs and Alabs (family heads) who signed had the "full and complete" right to represent the Enewetak people and included the following provisions with respect to claims for use of the atoll:

> Accordingly, the Chiefs and Alabs signing this agreement agree that any future claims based on the use of Enewetak by the Govern-

> ments of the United States or the Trust Territory or on the moving of the people from Enewetak Atoll to Ujelang Atoll shall be against them and not against the Government.

This agreement was made voluntarily and without any compulsion or coercion whatsoever.

On June 20, 1957, a document captioned "Use and Occupancy Agreement for Land in the Trust Territory of the Pacific Islands under the Administrative Responsibility of the Department of the Interior" was recorded in Record Book No. 1 of the Marshall Islands District. This document recites that it was made as of the 2nd day of March 1944 by and between the TTG, as grantor, and the United States of America; that the TTG was "owner of exclusive use and occupancy rights for an indefinite period of time" of the Enewetak Atoll; and that the United States "desires to acquire the use and occupancy of the land" for an indefinite period of time. In [796] the agreement the TTG conveyed to the United States the exclusive right to use and occupy Enewetak Atoll for an indefinite period of time and agreed to save the United States harmless from any and all claims, arising directly or indirectly, from such use or occupancy, except for claims arising from negligence by the United States. The section on conditions of use provided: (1) that use by the United States shall be consistent with the provisions and purposes of the Trusteeship Agreement; (2) that on or about June 30, 1961, and on a similar date each five-year period thereafter, the United States and the TTG would "jointly review and determine the need for continuing the use and occupancy," with final decision resting in the President of the United States; and (3) that, if a decision was made that a need for continued use and occupancy does

not exist, the grant would terminate and "all interest in said land shall revert to" the TTG.

During the 1960s, after the prohibition of atmospheric and underwater testing, Enewetak Atoll's lagoon was used as a target for test missiles fired from Vandenberg Air Force Base in California.

In September 1971 the United States Defense Nuclear Agency and the Air Force developed plans for an operation on Enewetak Atoll to be known as the Pacific Cratering Experiments ("PACE"). The program was designed to test cratering effects of nuclear blasts by simulating such blasts with high explosives. Between September 1971 and October 1973, the United States' preparations for PACE included stripping vegetation and topsoils from one of the islands. In October 1972 the United States District Court for the District of Hawaii granted a preliminary injunction to the people of Enewetak to prohibit further work on PACE until adequate environmental impact studies were conducted. *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Haw. 1973). On June 8, 1973, the Air Force terminated plans for the PACE program on Enewetak.

On April 18, 1972, the United States Special Representative to the Micronesian Political Status Talks announced that the United States would return Enewetak Atoll to the people of Enewetak by the end of 1973. From 1972 until 1977, various United States government agencies engaged in studies and planning for radiological cleanup and rehabilitation programs.

On August 31, 1976, representatives of the United States executed a document captioned "Agreement Terminating Rights, Title, and Interest of the United States to Enewetak Atoll." After reciting that the United States wishes to terminate its use and occu-

pancy in Enewetak Atoll, this document provided that all right, title, and interest of the United States in or to Enewetak Atoll "existing at noon on the day prior to the date of signature by the last party to sign this agreement are hereby terminated." The Acting High Commissioner of the TTG, the last party to sign, executed the document on September 16, 1976.

On September 16, 1976, the TTG Acting High Commissioner executed a document captioned "Release and Return of Use and Occupancy Rights to Enewetak Atoll." This document provided that the TTG does hereby "quitclaim, release and restore to all persons who hold traditional rights to the lands of Enewetak Atoll all right, title, interests and rights of use and occupancy in and to Enewetak Atoll."

From May 1977 through April 1980, the United States undertook cleanup efforts. In April 1980 the Enewetak people as a whole returned to Enewetak Atoll for permanent residence.

The Enewetak people have been able to resettle only the southern portion of the atoll. Access to several of the northern islands, including Engebi, is restricted by order of the Department of the Interior on the ground that remaining radioactivity renders these islands dangerous for habitation, agriculture, and many other uses for a period estimated to be approximately thirty years. Runit Island at present contains more than 110,000 cubic yards of plutonium-contaminated soil and debris that during the cleanup operation had been collected from throughout the atoll. This material had been mixed with cement and water to form a slurry, placed in a bomb crater on Runit, and covered by a concrete dome eighteen inches [797] thick and 370 feet in

diameter. Runit is expected to be extremely radioactive for at least the next 240,000 years.

II. Peter I, Juda I, and Nitol I

On September 15, 1982, plaintiffs first filed a complaint with the United States Claims Court, now the United States Court of Federal Claims. *Johannes Peter et al. v. United States*, No. 461-82L (Cl. Ct. filed Sept. 15, 1982). The complaint named "17 individual plaintiffs who claim on their own behalf and on behalf of a class composed of all persons recognized as the Enewetak people." *Peter v. United States*, 6 Cl. Ct. 768, 769 (1984) (granting and denying, in part, motion to dismiss) ("*Peter I*"). Plaintiffs alleged four causes of action: "(1) unlawful taking of Enewetak Atoll [for the period from December 1947 to April 1980]; (2) breach of an implied-in-fact contract that imposed upon the United States responsibilities toward the Enewetak people in the nature of a fiduciary; (3) failure to comply with the terms of the Trusteeship Agreement; and (4) breach of agreements between the United States and the Trust Territory Government." *Peter v. United States*, 13 Cl. Ct. 691, 691-92 (1987) ("*Peter II*") (dismissing complaint based on withdrawal of jurisdiction). On November 30, 1984, Judge Harkins granted defendant's motion to dismiss regarding Counts I, III, and IV and denied the motion to dismiss regarding plaintiffs' implied-in-fact contract claim. *Peter I* at 781.

Peter I concluded that, "[f]or purposes of application of the statute of limitations, in a claim for just compensation for a taking, August 22, 1958, must be the 'taking date' of Enewetak Atoll, in accordance with the doctrine announced in [*United States v. Dickinson*, 331 U.S. 745 (1947)]." *Id.* at 775. Based on this determination, the court dismissed plaintiffs' first cause of action

for failure to comply with the six-year statute of limitations in the Tucker Act, 28 U.S.C. § 2501 (1986). *Peter I* dismissed the third count based on 28 U.S.C. § 1502 (1986), holding that "[t]he Trusteeship Agreement is a treaty, and it has been made with a recognized unit of foreign nations. [The *Peter* p]laintiffs' claim in count III clearly grows out of and is dependent upon that treaty.... Such relationship bars jurisdiction in this court." *Id.* at 779 (citing *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976); *S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473, 478 (1964)). Regarding plaintiffs' implied-in-fact contract claim, the court held that "plaintiffs have alleged facts which for purposes of a motion to dismiss must be accepted as true. The facts, as alleged, establish conduct that is adequate to establish the requisite elements of a contract implied-in-fact." *Peter I* at 779; *see also id.* at 692 ("It was determined that plaintiffs were not barred by the statute of limitations from an offer of proof as to the origin, nature, and content of the alleged implied-in-fact contract, and that count II stated a breach of contract claim within the Tucker Act jurisdiction of this court.") Finally, the court held that count IV of plaintiffs' claims, which "alleges plaintiffs are third party beneficiaries to the overall transaction involved in the September 16, 1976, agreement between the TTG and the United States," was subject to dismissal because "the September 16, 1976, transactions did not confer rights as third party beneficiaries to plaintiffs." *Peter I* at 780, 781.

In conjunction with the filing of the complaint in *Peter*, thirteen other related cases were filed with the Claims Court regarding the effects of the Nuclear Testing Program in the Marshall Islands. Judge Harkins consolidated eleven complaints filed on September 9,

1981, and a twelfth complaint filed on July 26, 1982. *See Nitol v. United States*, 7 Cl. Ct. 405, 407 (1985) ("*Nitol I*"). The court explained:

> The claims of the inhabitants of the Bikini Atoll and Enewetak Atoll, sites used for atomic testing, factually are significantly different from each other, and both are distinguishable factually from the claims in the *Nitol* series of cases. For these reasons, the three types of claims have been handled separately. Only the *Nitol* series of cases have been consolidated.

Juda I at 446 (denying motion to dismiss).

The Nitol plaintiffs included "3,318 inhabitants of atolls and islands that were not used [798] as nuclear test sites. These claims are based primarily on the effects of radiological fallout and contamination that resulted from the test program...." *Id.* The *Nitol* plaintiffs alleged three causes of action:

> (I) an unlawful taking of plant life, fish life, fishing rights, the land, the lagoon, the waters of the lagoon, and surrounding ocean of the atoll or island; (II) breach of an implied-in-fact contract between the people of the Marshall Islands and the United States that obligated the United States as a fiduciary to protect the health, well being and economic condition of the Marshallese people; and (III) breach of fiduciary duties arising out of the Trusteeship Agreement, which is characterized as a bilateral contract between the United States and United Nations.

Nitol I at 412. Judge Harkins granted defendant's motion to dismiss as to counts II and III and denied defendant's motion as to count I. *Id.* at 417.

On March 16, 1981, plaintiffs in the related case of *Juda* filed their complaint, *Tomaki Juda et al. v. United States*, No. 172-81L (Cl. Ct. filed Mar. 16, 1981), "includ[ing] as plaintiffs the 1,004 members of the Bikini community as of May 1, 1981, and is concerned with the claims of the inhabitants of Bikini atoll." *Juda I* at 446. The plaintiffs in *Juda* alleged three causes of action:

> (1) an unlawful taking of Bikini Atoll from March 7, 1946, to January 24, 1979; (2) an unlawful taking that began on January 24, 1979, and would continue for the next 20 to 60 years; and (3) breaches of fiduciary responsibilities imposed in 1946, which do not depend upon the Trusteeship Agreement, but are claimed to arise from a contract implied-in-fact that obligates defendant to protect the health, well being and economic condition of the Bikini people.

Id. at 449.

Judge Harkins denied defendant's motion to dismiss in *Juda I* on October 5, 1984. *Id.* at 458. The court held, regarding counts 2 and 3, that "[s]ome of the claims clearly involve transactions that occurred after March 16, 1975... Plaintiffs are not barred by limitations from an offer of proof as to the origin, nature, and content of the alleged implied-in-fact contract and fiduciary relationship, if any, with respect to these claims." *Id.* at 451. Regarding count 1, the court found that, "Congress has acted with respect to these plaintiffs and their rights." *Id.* at 458. The court concluded that "[a]ll of the restraints of the Bill of Rights are applicable to

the United States wherever it has acted" and denied defendant's motion to dismiss for failure to state a claim. *Id.*

Juda "include[d] as plaintiffs the 1,004 members of the Bikini community as of May 1, 1981, and is concerned with the claims of the inhabitants of Bikini atoll." *Juda I* at 446. The plaintiffs in Juda alleged three causes of action:

> (1) an unlawful taking of Bikini Atoll from March 7, 1946, to January 24, 1979; (2) an unlawful taking that began on January 24, 1979, and would continue for the next 20 to 60 years; and (3) breaches of fiduciary responsibilities imposed in 1946, which do not depend upon the Trusteeship Agreement, but are claimed to arise from a contract implied-in-fact that obligates defendant to protect the health, well being and economic condition of the Bikini people.

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III. The Compact, the Section 177 Agreement, and the Nuclear Claims Tribunal

This section restates, with minor modifications, portions of the discussion in *Juda v.* [799] *United States*, 13 Cl. Ct. 667, 671-77 (1987) (dismissing complaint based on withdrawal of jurisdiction) ("*Juda II*"). From the war-time occupation of Micronesia in 1944 to approval of the Trust Territory Agreement on July 18, 1947, United States military authorities controlled the Pacific Islands. In 1947 military government was terminated, and administration of the Trust Territory was delegated to the Secretary of the Navy. Some elements of the takings claims and breach of contract claims in *Juda* and *Peter* occurred during this period.

At the end of World War II, little doubt existed that Micronesia would remain under United States control. Whether to annex the area or to place it under the trusteeship system of the United Nations was debated vigorously. Military leaders and the Secretary of War urged outright annexation for strategic reasons. The Secretary of State, on the other hand, urged that Micronesia be made a trusteeship in order to implement the principle of no territorial aggrandizement that had been expressed in the Atlantic Charter and the Cairo Declaration. Disagreement within the United States Government was not resolved until structures were developed in the United Nations relationship that assured the United States would have full control and full strategic rights in the area. These concerns resulted in a procedure that provided two categories of trusteeship: (1) non-strategic trust areas, overseen by the General Assembly and the United Nations Trusteeship Council (the "UNTC"), and (2) territories designated as strategic trust areas, overseen by the Security Council and the UNTC. *See generally* "Foreign Relations of

the United States, Diplomatic Papers: Conferences at Malta and Yalta 1945," at 92 (1955); R. Russell & J. Muther, *A History of the United Nations Charter*, 578 (1958).

Eleven trusteeship agreements were approved under the United Nations Charter; ten were for non-strategic trusts, and one, the Trusteeship Agreement for the Pacific Islands, was designated as a strategic trust. The Trusteeship Agreement represents the only instance where the United States has assumed responsibility for administering a foreign territory under the authority of an international organization.

The United Nations Charter, in Articles 75 through 85, provides for the international trusteeship system. Article 76(b) is a recognition of the principle that an administering authority is accountable to the international community for administration of the trust area. It obligates the administering authority to promote the political advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence. Article 83 provides that the Security Council would exercise all functions of the United Nations relating to strategic areas. The Charter, however, does not authorize specifically the Security Council to approve the termination of a strategic trusteeship agreement. Article 83 provides:

> 1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.
>
> 2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

> 3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

The Trusteeship Agreement is a treaty in the nature of a bilateral contract between the Security Council and the United States. Article 6 of the Trusteeship Agreement obligates the United States, in the discharge of its obligations under Article 76(b) of the Charter, to foster the development of such political institutions as are suited to the trust territory and to promote the development of the inhabitants towards self-government or independence, as may be appropriate to the particular circumstances of the territory and its peoples. The United States agreed to give the inhabitants of the Trust Territory a [800] progressively increasing share in the administrative services in the territory and to develop their participation in government.

Article 15 of the Trusteeship Agreement provides: "The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority." During the negotiations leading to the agreement, the representative of the Soviet Union objected to this provision and proposed language that would have permitted the Security Council unilaterally to alter, amend, or terminate the Agreement. The United States representative refused to agree to the provision that would give the Security Council such power, and, in order to protect United States strategic interests, he insisted that no termina-

tion could occur without the consent of the United States.

During the 1960s, in administering the Trusteeship Agreement, the United States initiated efforts to prepare the people for the transition to constitutional self-government. In 1965 the Congress of Micronesia was created, and elected leaders from all parts of the Trust Territory met to discuss common problems and to explore the concept of political unity. Initially, the United States encouraged, and the Trust Territory leaders explored, the possibility of commonwealth status for the various island groups. This proposal was not accepted generally. Further, differences in geography, history, and culture made it difficult to create a single governmental unit that included all of the inhabitants of the Trust Territory. Four separate political entities ultimately were established.

On March 24, 1976, the United States approved the "Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America." Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified as amended at 48 U.S.C. § 1681 (1982)). The constitution for the Federated States of Micronesia (the "FSM") was ratified on July 12, 1978. The Republic of the Marshall Islands (the "RMI") approved its constitution in a referendum on March 1, 1979, and inaugurated a parliamentary constitutional government on May 1, 1979. The constitution for the Republic of Palau was approved at a United Nations-observed referendum on July 9, 1979. The Palau legislature subsequently voided the results of this referendum, and a second referendum was scheduled. The constitution was defeated in a referendum held October 23, 1979. In April 1980 the High Commissioner approved a Palau public law that provided a timetable for the in-

stallation of a government under the original constitution. Under the terms of the bill, the Palau constitution took effect on January 1, 1981.

After July 1, 1962, the Secretary of the Interior had exercised all necessary powers of civil government provided by the Trusteeship Agreement. On April 25, 1979, the Secretary recognized the new governmental entities of the Federated States of Micronesia, the Marshall Islands, and Palau and delegated to each the executive, legislative, and judicial functions of the government of the Trust Territory of the Pacific Islands. Secretary Order No. 3039, Apr. 25, 1979. Order No. 3039 provided that the High Commissioner shall continue to exercise all authority necessary to carry out United States' obligations under the 1947 Trusteeship Agreement. This retained authority specifically listed eight categories of administrative functions, including Budget, Accounting, Relations with other United States Government Agencies, and Foreign Governments. All laws of the three governmental units were required to be submitted to the High Commissioner for approval.

A Compact of Free Association was negotiated with each of the individual states. The governments of the United States and the Marshall Islands and the governments of the United States and the Federated States of Micronesia initialed the Compact of Free Association on October 31, 1980. The Compact of Free Association with the government of Palau was initialed on November 17, 1980. Further reviews followed, and the final version of the Compact of Free Association with the Republic of Palau was signed on August 26, 1982, and with the Federated States of Micronesia, on October 1, 1982. The United States and the RMI

signed the Compact and its related agreements on June 25, 1983.

[801] After execution by the signatory governments, the Compacts of Free Association were presented to the people in plebiscites monitored by international observers from the United Nations Trusteeship Council. The Federated States of Micronesia plebiscite was held in June 1983, and the Compact was approved by seventy-nine percent. The RMI plebiscite was held in September 1983, and the Compact was approved by fifty-eight percent. In Palau plebiscites were held on February 10, 1983, and on modified versions on September 4, 1984, and February 1, 1986. On February 24, 1986, the President of the Republic of Palau certified to the United States that the Compact of Free Association had been approved.

The Compact was submitted to Congress on March 30, 1984. Action on the legislation was not completed in the 98th Congress, and the Compact was resubmitted to the 99th Congress on February 20, 1985. Hearings were held in each body, and each passed differing versions. The legislation was not referred to a conference committee; differences were resolved in meetings between representatives from each body and from the Administration. The final version, House Joint Resolution No. 187, was presented without a Conference Report; it was approved by the House of Representatives on December 11, 1985, and by the Senate on December 13, 1985. It was signed by the President on January 14, 1986. Pub. L. No. 99-239, 99 Stat. 1770 (1986). By its terms (Section 471(c)), the Compact has the force and effect of a statute under the laws of the United States.

The legislation that approves the Compact of Free Association with the RMI and the FSM bears the title

"Compact of Free Association Act of 1985" (the "Compact Act"). It contains Titles I through V. Title I includes provisions that relate to approval of the Compact; interpretation of, and United States policies regarding, the Compact; and supplemental provisions. Title II contains the terms of the Compact of Free Association as signed by the parties and approved in the plebiscites. Compact Titles III, IV, and V relate to Pacific policy reports, clarification of certain trade and tax provisions, and the Compact with the Republic of Palau.

A number of provisions relate to the effective date of the Compact. Section 101(b) of the Compact Act provides:

> (b) MARSHALL ISLANDS.—The Compact of Free Association set forth in title II of this joint resolution between the United States and the Government of the Marshall Islands is hereby approved, and Congress hereby consents to the subsidiary agreements as set forth on pages 115 through 391 of House Document 98-192 of March 30, 1984, as they relate to such Government. Subject to the provisions of this joint resolution, the President is authorized to agree, in accordance with section 411 of the Compact, to an effective date for and thereafter to implement such Compact, having taken into account any procedures with respect to the United Nations for termination of the Trusteeship Agreement.

Section 411 of the Compact provides:

> This Compact shall come into effect upon mutual agreement between the Government of the United States, acting in fulfillment of its re-

sponsibilities as Administering Authority of the Trust Territory of the Pacific Islands, and the Government of the Marshall Islands or the Federated States of Micronesia and subsequent to the completion of the following:

(a) Approval by the Government of the Marshall Islands or the Federated States of Micronesia in accordance with its constitutional processes.

(b) Conduct of the plebiscite referred to in Section 412.

(c) Approval by the Government of the United States in accordance with its constitutional processes.

Section 171 of the Compact suspends the laws of the United States to the Trust Territory on the effective date. Section 171 provides:

Except as provided in this Compact or its related agreements, the application of the laws of the United States to the Trust Territory of the Pacific Islands by virtue of the Trusteeship Agreement ceases with re-[802]spect to the Marshall Islands and the Federated States of Micronesia as of the effective date of this Compact.

Section 127 of the Compact provides:

Except as otherwise provided in this Compact or its related agreements, all obligations, responsibilities, rights and benefits of the Government of the United States as Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agreement

> to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact are no longer assumed and enjoyed by the Government of the United States.

Section 177 of the Compact provides a procedure for the disposition of claims that have resulted from the Nuclear Testing Program. A separate agreement between the United States and the RMI is authorized to provide for the settlement of all such claims (the "Section 177 Agreement"). Section 177 provides that "[t]his separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its terms." Article XIII, section 1 of the Section 177 Agreement provides: "This Agreement shall come into effect simultaneously with the Compact in accordance with Section 177 of the Compact."

Section 177 of the Compact provides:

> (a) The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.
>
> (b) The Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not

as yet been compensated or which in the future may arise, for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs and radiological monitoring activities and for such additional programs and activities as may be mutually agreed, and for the assumption by the Government of the Marshall Islands of responsibility for enforcement of limitations on the utilization of affected areas developed in cooperation with the Government of the United States and for the assistance by the Government of the United States in the exercise of such responsibility as may be mutually agreed. This separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its own terms.

(c) The Government of the United States shall provide to the Government of the Marshall Islands, on a grant basis, the amount of $150 million to be paid and distributed in accordance with the separate agreement referred to in this Section, and shall provide the services and programs set forth in this separate agreement, the language of which is incorporated into this Compact.

The Compact Act approves Compact Section 177 and, by reference, specifically incorporates the provisions of the Section 177 Agreement into the Compact Act. Section 103(g) of the Compact Act provides:

(g) ESPOUSAL PROVISIONS.—(1) It is the intention of the Congress of the United States that the provisions of section 177 of the Com-

pact of Free Association and the Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact (hereafter in this subsection referred to as the "Section 177 Agreement") constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement.

(2) In furtherance of the intention of Congress as stated in paragraph (1) of this [803] subsection, the Section 177 Agreement is hereby ratified and approved. It is the explicit understanding and intent of Congress that the jurisdictional limitations set forth in Article XII of such Agreement are enacted solely and exclusively to accomplish the objective of Article X of such Agreement and only as a clarification of the effect of Article X, and are not to be construed or implemented separately from Article X.

The Section 177 Agreement provides for the establishment and operation by the RMI of a Claims Tribunal (the "Claims Tribunal"). The Claims Tribunal was given "jurisdiction to render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program...." Article IV, section 1(a) of the Section 177 Agreement includes the following limitation: "This section confers in the Claims Tribunal no jurisdiction over the United States, its agents, employees, contractors, citizens or nationals with respect

to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program."

Article X, Section 1 of the Section 177 Agreement provides:

> Section 1—Full Settlement of All Claims
>
> This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

Article XII of the Section 177 Agreement provides:

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

On May 28, 1986, the UNTC, in Resolution No. 2183, reaffirmed that the peoples of the Northern Mariana Islands, the RMI, the FSM, and Palau had "freely exercised their right to self-determination in plebiscites observed by visiting missions of the Trus-

teeship Council." The UNTC determined that the United States as the Administering Authority "has satisfactorily discharged its obligations under the terms of the Trusteeship Agreement and that it is appropriate for that Agreement to be terminated." The UNTC requested that the United States, in consultation with the respective governments, to agree on a date no later than September 30, 1986, for the full entry into force of the Compact of Free Association and the Commonwealth Covenant and to inform the Secretary General of the United Nations of that date. The official records of the UNSC for the period ending June 30, 1986, show that UNTC Resolution No. 2183 was reported to the Security Council.

Between May and October 1986, representatives of the United States and representatives of the RMI negotiated to establish an effective date for the Compact. On October 10, 1986, the parties executed an agreement providing, pursuant to Section 411 of the Compact, that the effective date of the Compact would be October 21, 1986.

On October 16, 1986, the President issued Executive Order No. 12,569 to provide for changes in the responsibilities of United States officials when the Compact became effective. The Secretary of State was made responsible for conducting government-to-government relations with the RMI, the FSM, and the Republic of Palau. The responsibilities of the Secretary of the Interior were redefined to include:

> Sec. 2 Responsibility of the Secretary of the Interior. The Secretary of the Interior shall be responsible for seeking the appropriation of funds for and, in accordance with the laws of the United States, [804] shall make available to

the Freely Associated States the United States economic and financial assistance appropriated pursuant to Article I of Title Two of the Compact; the grant, service, and program assistance appropriated pursuant to Article II of Title Two of the Compact; and all other United States assistance appropriated pursuant to the Compact and its related agreements. The Secretary shall coordinate and monitor any program or any activity by any department or agency of the United States provided to the Freely Associated States and shall coordinate and monitor related economic development planning. This Section shall not apply to services provided by the Department of Defense to the Freely Associated States or to activities pursuant to Section 1 of this Order, including activities under the Peace Corps Act.

Section 8, Supersession and Savings Provisions, of the Executive Order provides:

(a) Subject to the provisions of Section 9 of this Order, prior Executive orders concerning the former Trust Territory of the Pacific Islands are hereby superseded and rendered inapplicable, except that the authority of the Secretary of the Interior as provided in applicable provisions of Executive Order No. 11021, as amended, shall remain in effect, in a manner consistent with this Order and pursuant to section 105(c)(2) of the Act, to terminate the trust territory government and discharge its responsibilities, at which time the entirety of Executive Order No. 11021 shall be superseded.

> (b) Nothing in this Order shall be construed as modifying the rights or obligations of the United States under the provisions of the Compact or as affecting or modifying the responsibility of the Secretary of State and the Attorney General to interpret the rights and obligations of the United States arising out of or concerning the Compact.

By letter dated October 23, 1986, the United States Permanent Representative to the United Nations notified the Secretary General of the United Nations that, as a consequence of consultations held between the United States Government and the Government of the RMI, "agreement has been reached that October 21, 1986, is the date upon which the Compact of Free Association with the Marshall Islands enters fully into force."

On November 3, 1986, the President announced in Proclamation No. 5564 that, as of that date, the United States "has fulfilled its obligations under the Trusteeship Agreement with respect to the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, and the Federated States of Micronesia, and they are self-governing and no longer subject to the Trusteeship." Proclamation No. 5564 further provided:

> Section 1. I determine that the Trusteeship Agreement for the Pacific Islands is no longer in effect as of October 21, 1986, with respect to the Republic of the Marshall Islands, as of November 3, 1986, with respect to the Federated States of Micronesia, and as of November 3, 1986, with respect to the Northern Mariana Is-

lands. This constitutes the determination referred to in Section 1002 of the Covenant.

In keeping with its decision that the RMI was a sovereign self-governing state, on April 22, 1987, the President's nomination of the United States diplomatic representative to the Marshall Islands was announced; on May 4, 1987, the Government of the RMI was notified formally that the general relations between the two governments would be governed by international law, as reflected in the Vienna Convention on Diplomatic Relations and that the RMI representatives would be accorded status commensurate with the heads of diplomatic missions, as this expression is used in the Convention. On June 3, 1987, the United States Senate gave its consent to appointment of the President's nominee.

IV. Juda II, Peter II, Nitol II, and People of Enewetak

On March 4, 1986, defendant filed motions to dismiss in *Juda*, *Nitol*, and *Peter* characterizing the claims as posing a non-justiciable political question after the passage of the [805] Compact and the execution of the Section 177 Agreement. *See Juda v. United States*, 13 Cl. Ct. 667, 669 (1987) ("*Juda II*"). On November 4, 1986, defendant filed amended motions to dismiss adding as a ground the lack of subject matter jurisdiction due to the effect of the withdrawal of jurisdiction contained in the Section 177 Agreement. *Id.* at 670.

On November 10, 1987, Judge Harkins dismissed the surviving claims in *Juda* for lack of subject matter jurisdiction, issuing dismissals of the *Peter* and *Nitol* cases on the same date that relied on the same rationale. *See Juda II* at 690 ("The consent of the United States to be sued in the Claims Court on plaintiffs' tak-

ing claims and breach of contract claims that arise from the United States' nuclear testing program in the Marshall Islands has been withdrawn."); *see also Peter v. United States*, 13 Cl. Ct. 691, 692 (1987) ("The withdrawal by the United States of its consent to be sued, as set forth in the memorandum of decision in the *Juda* case, applies to plaintiffs' remaining claims in this case.") ("*Peter II*"); *Nitol v. United States*, 13 Cl. Ct. 690, 691 (1987) ("*Nitol II*") (same as *Peter II*). The court found that "the Compact of Free Association, the Section 177 Agreement, and Articles X, XI, and XII of that agreement, went into effect on October 21, 1986." *Juda II* at 682-83. The court found that "[t]he RMI and the United States unquestionably intended that the Section 177 Agreement would be a complete settlement of all claims arising from the nuclear testing program." *Id.* at 684. Concluding that the Section 177 Agreement and the Compact validly withdrew consent to sue the United States in the Claims Court, the court dismissed plaintiffs' claims. *Id.* at 690. Nevertheless, Judge Harkins stated that it was "premature" for the court to hear plaintiffs' objections to the adequacy of the compensation:

> Whether the compensation, in the alternative procedures provided by Congress in the Compact Act, is adequate is dependent upon the amount and type of compensation that ultimately is provided through these procedures. Congress has recognized and protected plaintiffs' rights to just compensation for takings and for breach of contract. The settlement procedure, as effectuated through the Section 177 Agreement, provides a "reasonable" and "certain" means for obtaining compensation. Whether the settlement provides "adequate"

> compensation cannot be determined at this time.
>
> ....
>
> .... This alternative procedure for compensation cannot be challenged judicially until it has run its course.

Id. at 689.

The Federal Circuit consolidated the appeals of the Claims Court in *Peter II*, *Juda II*, and *Nitol II* in *People of Enewetak v. United States*, 864 F.2d 134 (Fed. Cir. 1988). The appeal of *Juda II* was dismissed with prejudice "upon the unopposed motion of claimants, following the enactment of special legislation which appropriated funds for the benefit of the People of Bikini." *People of Enewetak*, 864 F.2d at 135 n.1; *see People of Bikini v. United States*, 859 F.2d 1482 (Fed. Cir. 1988) (order dismissing case).

The settlement in *People of Bikini* was signed into law on September 27, 1988, and provided:

> That in full satisfaction of the obligation of the United States to provide funds to assist in the resettlement and rehabilitation of Bikini Atoll by the People of Bikini, to which the full faith and credit of the United States is pledged pursuant to section 103(l) of Public Law 99-239, the United States shall deposit $90,000,000 into the Resettlement Trust Fund for the People of Bikini established pursuant to Public Law 97-257, and governed pursuant to the terms of such trust instrument, such deposit to be installments of $5,000,000 on October 1, 1988; $22,000,000 on October 1, 1989; $21,000,000 on October 1, 1990; $21,000,000 on October 1, 1991;

and $21,000,000 on October 1, 1992: Provided further, That the terms of such Resettlement Trust Fund are hereby modified to provide that corpus and income may be expended for rehabilitation and resettlement of Bikini Atoll, except that the Secretary may approve expenditures not to exceed $2,000,000 in any year from income [806] for projects on Kili or Ejit: Provided further, That one year prior to completion of the rehabilitation and resettlement program, the Secretary of the Interior shall report to Congress on future funding needs on Bikini Atoll. Unless otherwise determined by Congress, following completion of the rehabilitation and resettlement program, funds remaining in the Resettlement Trust Fund in excess of the amount identified by the Secretary as required for future funding needs shall be deposited in the United States Treasury as miscellaneous receipts. Upon completion of those needs, the Resettlement Trust Fund shall be extinguished and all remaining funds shall be deposited in the United States Treasury as miscellaneous receipts. The payment and use of funds in accordance herewith is for the sole purpose of implementing and fulfilling the terms of the Section 177 Agreement referred to in section 462(d) of the Compact of Free Association between the United States and the Republic of the Marshall Islands, including Article VI, section 1, and Articles X and XII, thereof. Payments pursuant hereto shall be made only upon: One, voluntary dismissal with prejudice of *Juda et al. v. the United States*, No. 88-1206 (Fed. Cir.); and two,

> submission of written notice to the United States and the Republic of the Marshall Islands, executed by duly-authorized representatives acting on their behalf, that the People of Bikini accept the obligations and undertaking of the United States to make the payments prescribed by this Act, together with the other payments, rights, entitlements and benefits provided for under the Section 177 Agreement, as full satisfaction of all claims of the People of Bikini related in any way to the United States nuclear testing program in accordance with the terms of the Section 177 Agreement.

Pub. L. No. 100-446, 102 Stat. 1774, 1798 (1988).

The Federal Circuit affirmed the decisions of the Claims Court in *Peter II* and *Nitol II*, holding:

> The [Compact] Act and the section 177 Agreement, provide, in perpetuity, a means to address past, present and future consequences, including the resolution of individual claims, arising from the United States nuclear testing program in the Marshall Islands between June 30, 1946 and August 18, 1958. Congress intended the alternative procedure to be utilized, and we are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate.

People of Enewetak, 864 F.2d at 136. The court stated that a determination of the adequacy of the alternative procedure for compensation was not required "in advance of the exhaustion of the alternative provided" and adopted the "[Claims Court's] more extensive analysis in *Juda v. United States*, 13 Cl. Ct. 667 (1987),

relating to the issues discussed." *People of Enewetak* 864 F.2d at 137.

On August 22, 1983, approximately 3,000 present and former residents of the RMI located downwind from the nuclear test sites filed a claim seeking damages for personal injuries and death pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674 (2000) (the "FTCA"). The district court held that "the RMI's espousal and settlement of the claims were not reviewable by the courts of the United States and that the Court lacked 'jurisdiction over plaintiffs' claims, pursuant to valid law and in conjunction with non-reviewable foreign relations decisions.'" *Antolok v. United States*, 873 F.2d 369, 372 (D.C. Cir. 1989) (quoting *Antolok v. United States*, No. 83-2471, slip op. at 8 (D.D.C. Jun. 16, 1987)). The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the lower court, holding that, while "the Federal Tort Claims Act, 28 U.S.C. § 1346(b), initially provided a waiver of immunity for this tort action, Congress withdrew their consent for this type of claim in ratifying the Compact and the Section 177 Agreement...." 873 F.2d at 374. The court compared the tort claim brought to a potential takings claim, stating that "even if the legislation amounted to an actual taking of property ... then the substitution of another remedy is compensation therefor." *Id.* at 378. Nevertheless, the court noted that, "[i]f there is an uncompensated or inade-[807]quately compensated taking, then plaintiffs' remedy is in the Claims Court under the Tucker Act, 28 U.S.C. § 1491(a)(1), not in District Court under the Federal Tort Claims Act." *Id.* As no valid constitutional claim was before the court, it declined to review "the difficult question of whether inferior courts may

be barred by an act of Congress from review of constitutional challenges to statutes." *Id.* (citations omitted).

Judge Sentelle, who authored the panel's opinion, set forth his separate views[3] with respect to the role of the political question doctrine:

> [E]ven if we err in our interpretation of [the Compact] Act, I would not reach the merits but would conclude that the District Court was without jurisdiction over this matter of international relations by reason of the political question doctrine.
>
> ....
>
> .... While I do not deny that the plaintiffs herein raise good faith objections to the decision of the Executive ..., our deferral to the political branches in political questions is not limited to those where they are correct. It would require our invasion of their sphere for us to make the determination that they were wrong, and it is against that very invasion that the political question doctrine protects the political realm from judicial invasion.

Id. at 379, 383.

Then-Chief Judge Wald's special concurrence distinguished the takings claim raised in *Antolok* from the

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[3] Chief Judge Wald and Judge Starr did not join Judge Sentelle as to section II.B of the opinion in *Antolok*, which discusses the political question doctrine. *See Antolok*, 873 F.2d at 379. Chief Judge Wald filed a separate opinion concurring in the result to express an alternative application of the political question doctrine. *See id.* at 385 (Wald, J., concurring).

takings claims raised in *People of Enewetak*: "Plaintiffs responded to the government's defense (lack of jurisdiction) by arguing that a withdrawal of jurisdiction would constitute an uncompensated taking; the property allegedly taken here is the plaintiffs' cause of action in tort." *Antolok*, 873 F.2d at 393 n.15. In contrast, the takings claim in *People of Enewetak* involved "property allegedly taken [that included] plaintiffs' lands, homes, and businesses." *Id.*

V. The Nuclear Claims Tribunal decisions and Changed Circumstances Request

The Nuclear Claims Tribunal (the "NCT") was established in 1987 when the Nitijela, the legislative body of the RMI, passed the Nuclear Claims Tribunal Act. On July 16, 1990, plaintiffs filed a class action in the NCT seeking damages for loss of use of Enewetak Atoll, restoration costs for cleanup of contaminated portions of the atoll, and consequential and hardship damages for the Enewetak people.

The NCT issued its initial decision regarding plaintiffs' claim on April 13, 2000, awarding plaintiffs $324,949,311, which included "$199,154,811 for past and future loss of use of Enewetak Atoll .... $91,710,000 to restore Enewetak to a safe and productive state.... [and] $34,084,500 for the hardships suffered ...." *See* PX 5 at 34. The NCT qualified its decision by stating:

> This is not an eminent domain proceeding nor a claim under constitutional provisions for just compensation for a taking of property for public use. neither the U.S. or R.M.I. government is a party to this action, and consequently certain elements in a determination of just compensation are not present. Nonetheless, prin-

> ciples of just compensation, to the extent that they aid in a determination of what is necessary to make claimants whole, may be referenced ... where appropriate.

PX 5 at 4. This award was the "first award for damages to property" made by the NCT. *Id.* at 33. The NCT's award considered various factors, including deductions from the gross award for amounts already received through the Compact and the Section 177 Agreement. Restoration costs were awarded for the following purposes: $22.5 million for removal and replacement of contaminated soil; $31.5 million for construction of a causeway for disposal of the contaminated soil; $15.5 million for potassium treatment to block radioactive Cesium 137 uptake from locally grown foods; $17.7 million for soil rehabilitation and revegetation; $10 million [808] for plutonium cleanup on Runit Island; and $4.51 million for characterization surveys of the contaminated soil. The NCT deducted $10 million from the total restoration award, equivalent to the value of the Enjebi Trust Fund, which was established by the Compact of Free Association for restoration of portions of Enewetak, thereby yielding a net award of $91,710,000 for restoration. PX 5 at 28. Past and future loss amounts were computed based on annual rental values for the land occupied by the United States, which resulted in a gross award of $304,000,000 for past loss use.

The NCT amended its decision on May 5, 2000, including "an additional $16.1 million as the cost to restore the soil and revegetate the 558 acres subject to soil removal as part of the radiological cleanup." PX 6 at 2. The NCT again amended its decision on August 3, 2000, revising the amount of damages for loss of future use to $47,001,908 and supplementing this amount with

prejudgment interest in the amount of $47,681,122. PX 7 at 5. In addition, the NCT revised its award to plaintiffs to include "interest in the amount of 7% per year ... on the loss of use damages of $244,000,000 and restoration damages of $107,810,000." PX 7 at 5.

The NCT issued its decision regarding the claims of the inhabitants of Bikini Atoll on March 5, 2001. The NCT determined that the People of Bikini were entitled to a total of $563,315,500: $278,000,000 for past and future loss of use; $251,500,000 for restoration costs; and $33,815,500 for hardships suffered.

Thus, the total amounts awarded to the Enewetak people and the People of Bikini by the NCT include the following components:

Enewetak people:

Loss of use:	$244,000,000 + 7% interest
Restoration:	$107,810,000 + 7% interest
Hardship:	$ 34,084,500
TOTAL:	$385,894,500 + interest

People of Bikini:

Loss of use:	$278,000,000 + 7% interest
Restoration:	$251,500,000 + 7% interest
Hardship:	$ 33,815,500
TOTAL:	$563,315,500 + interest

In February 2002 the NCT made a payment of $1,078,750 to the Enewetak people and $1,491,809 to the People of Bikini, amounts which constituted 0.25% of their respective awards. In February 2003 the NCT made another partial payment of 0.125% of the total awarded amount, giving $568,733 to the Enewetak peo-

ple and $787,370 to the People of Bikini. Since February 2003, the NCT has not rendered any further payments to either the Enewetak people or the People of Bikini. The NCT has exhausted the $45.75 million allocated in the Section 177 Agreement with respect to payments for personal injury awards that exceed $80 million. The $150-million trust fund established has been reduced to a current balance of less than $1.8 million.

In 2002 the RMI retained former United States Attorney General Richard Thornburgh to undertake an independent examination of the NCT's processes in response to concerns raised by the United States Government regarding the transparency of the NCT's operations. Mr. Thornburgh issued a report in January 2003 (the "Thornburgh Report") concluding "that the NCT fulfilled the task for which it was created in a reasonable, fair and orderly manner, and with adequate independence." Am. Compl. ¶ 153. The Thornburgh Report stated that "[i]t is our judgment that the $150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the dozens of U.S. nuclear tests that took place in their homeland." Am. Compl. ¶ 154 (quoting Thornburgh Report).

Article IX of the Section 177 Agreement (the "Changed Circumstances provision") provides:

> If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably [809] have been identified

> as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

Pursuant to Article IX, entitled "Changed Circumstances," the RMI presented a "Petition Presented to the Congress of the United States of America Regarding Changed Circumstances Arising from U.S. Nuclear Testing in the Marshall Islands" (the "Changed Circumstances Request") on September 11, 2000. Am. Compl. ¶ 163. The Changed Circumstances Request was resubmitted to Congress on November 14, 2001.

The Senate Energy and Natural Resources Committee and the House Resources Committee requested that an interagency group evaluate the Changed Circumstances Request. On January 4, 2005, the United States Department of State submitted the "Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America" to Senator Jeff Bingaman of New Mexico. The report stated that the Changed Circumstances Request did not satisfy the requirements contained in Article IX of the Section 177 Agreement and therefore concluded that no legal basis for additional payments was raised in the Changed Circumstances Request. On July 19, 2005, the House Committee on Resources and the House Committee on International Relations Subcommittee on Asia and the

Pacific held a joint hearing regarding the RMI and the Changed Circumstances Request. The court has not been made aware of any action by Congress since that date.

DISCUSSION

Defendant has moved pursuant to RCFC 12(b)(1) and 12(b)(6) for dismissal of plaintiffs' Amended Complaint for lack of subject matter jurisdiction, or, alternatively, for failure to state a claim upon which relief can be granted. The former ground implicates the statute of limitations and withdrawal of jurisdiction in the courts; the latter, the doctrine of res judicata.

I. Statute of limitations

Jurisdiction must be established before the court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Any party may challenge, or the court may raise *sua sponte*, subject matter jurisdiction at any point in a proceeding, even upon appeal. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). If the jurisdictional facts alleged in the complaint are disputed, "the ... court may consider relevant evidence in order to resolve the factual dispute." *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988); *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999) (holding that "[f]act-finding is proper when considering a motion to dismiss where the jurisdictional facts in the complaint ... are challenged"); *see also Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (permitting review of evidence extrinsic to pleadings, including affidavits and deposition testimony). Once the court's subject matter jurisdiction is put into question, it is "incumbent upon [plaintiff] to come forward

with evidence establishing the court's jurisdiction. We agree that [plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds*, 846 F.2d at 748; *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (holding that, "[i]f [plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof").

The statute of limitations set forth in the Tucker Act requires that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2000). The six-year statute of limitations "set forth in § 2501 [of Title 28] is a [810] jurisdictional requirement." *Bianchi v. United States*, 475 F.3d 1268, 1274 (Fed. Cir. 2007); *John R. Sand & Gravel v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006), *cert. granted*, 127 S.Ct. 2877 (2007) (No. 06-1164, 2007 Term) ("The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims."); *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."). Because it is jurisdictional, the requirement of section 2501 cannot be waived. *John R. Sand & Gravel*, 457 F.3d at 1354 (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

Recent decisions of the Federal Circuit have held that claims failing to satisfy section 2501 should be dismissed for failure to state a claim, rather than for lack

of subject matter jurisdiction. *See, e.g.*, *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n.2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here ... would seem to be that [plaintiff] failed to make its claim within the required limitations period—that is not a question of subject matter jurisdiction of the court."); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("The Court of Federal Claims has subject matter jurisdiction to adjudicate cases arising under the Tucker Act regardless of the timeliness of [plaintiff's] actions. [Plaintiff's] untimeliness can, however, bar its eligibility to invoke that jurisdiction."). Panels of the Federal Circuit continue to disagree on this issue, as evidenced by Judge Newman's dissent in *John R. Sand & Gravel*, 457 F.3d at 1361, now on review by the Supreme Court. In dissenting from the majority's holding that the statute of limitations contained in section 2501 is jurisdictional, Judge Newman stated:

> [T]he Court of Federal Claims, without dispute, had jurisdiction of the parties and the subject matter.... The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already "has jurisdiction"....
>
> Contrary to the position of the panel majority, the limitations period is not itself a matter of jurisdiction.

Id. at 1361-62 (citations omitted); *see also Martinez*, 333 F.3d at 1320 (Mayer, C.J., Plager, Newman, Gajarsa, Linn, & Dyk, JJ., dissenting). Despite a nascent shift in the more recent appellate decisions, the court follows the binding precedent that a motion to dismiss a complaint as time-barred by the statute of limitations prop-

erly is considered as a motion to dismiss for lack of subject matter jurisdiction, given the en banc decision in *Martinez* and the majority opinion in *John R. Sand & Gravel.*[4]

In response to defendant's invocation of the Tucker Act's six-year statute of limitations, plaintiffs counter that defendant should be estopped from raising the statute of limitations or, alternatively, that the statute of limitations should be equitably tolled because the failure of the "alternative claims procedure to provide adequate compensation for the loss of [plaintiffs'] land[] ... was unknowable until August 3, 2000, the date of the NCT decision ...." Pls.' Br. filed Dec. 18, 2006, at 43. Plaintiffs assert that

> [p]rior to that date, there had been no determination of what constituted "just compensation" in this matter, and any claims challenging the procedure would have been deemed "premature" or unripe, as was found by this Court in *Juda*, 13 Cl.Ct. at 689, and affirmed by the Federal Circuit in *People of Enewetak*, 864 F.2d at 136.

Id.

"A claim accrues when all events have occurred that fix the alleged liability of the [811] Government

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[4] *Certiorari* was granted by the Supreme Court of the United States on May 29, 2007, "limited to Question 1 presented by the petition," *John R. Sand & Gravel Co. v. United States*, 127 S. Ct. 2877 (2007), which asks "[w]hether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the Court of Federal Claims." Petition for Writ of Certiorari, *John R. Sand & Gravel*, 127 S. Ct. 2877 (2007) (No. 06-1164).

and entitle the plaintiff to institute an action." *Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994); *see Hopland Band of Pomo Indians*, 855 F.2d at 1577 (stating that cause of action accrues "only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence"). A cause of action accrues, when a plaintiff is "armed with the facts about the harm done to him." *United States v. Kubrick*, 444 U.S. 111, 123 (1979). "A claimant under the Fifth Amendment must show that the United States, by some specific action, took a private property interest for a public use without just compensation." *Alliance of Descendants of Tex. Land Grants*, 37 F.3d at 1481.

In Count III of their Amended Complaint, plaintiffs allege that defendant has not provided just compensation as required by the Fifth Amendment by "failing to adequately fund the Tribunal so that it could pay Plaintiffs' award." Am. Compl. ¶ 203. Framed another way, plaintiffs allege that the Government took their claims in violation of their Fifth Amendment right to just compensation because Congress has failed to act on the Changed Circumstances Request. A report to Congress does not constitute a governmental action that could be considered a taking of any interest. A report merely supplies Congress with information that may justify or prompt further action. Congress has made no final determination on plaintiffs' petition, and the apparent lack of action after two years cannot establish a taking until plaintiffs can show that Congress no longer is considering their petition. Therefore, the court finds that no government act has taken place within the last six-years that relates to the asserted taking of plaintiffs' private property interest.

In Count IV of their Amended Complaint, plaintiffs allege that "[defendant's] fail[ure] to adequately fund the Tribunal so that it could pay Plaintiffs' award has taken Plaintiffs' implied contract claim without providing the just compensation as required by the Fifth Amendment to the United States Constitution." Am. Compl. ¶ 207. As in Count III, plaintiffs have not alleged any action on the part of the United States Government occurring within the last six years that could be considered a breach of plaintiffs' claimed implied-in-fact contract with the United States. While Congress has not yet acted on plaintiffs' petition, that circumstance does not constitute an action on the part of the Government sufficient to meet the requirements of the statute of limitations.

Count V alleges that "[t]he Compact agreements constitute a taking of Enewetak Atoll or, as applied, constitute a taking of Enewetak Atoll." Am. Compl. ¶ 210. Count VI alleges that "[t]he Compact agreements constitute breaches of fiduciary obligations imposed by the creation of a contract implied-in-fact between defendant and plaintiffs." *Id.* ¶ 214. Plaintiffs have failed to allege a government act that occurred within the last six years. Any breach of the implied-in-fact contract or duties or covenants would have occurred in 1986 when the Act became effective. Nothing has changed since 1986 when all of the events occurred to fix the alleged liability of the Government.

Plaintiffs argue that "Counts III-VI of plaintiffs' Amended Complaint are based on the failure of the alternative claims procedure to provide adequate compensation for the loss of and damage to their lands. Although this failure was unknowable until after August 3, 2000, the date of the final NCT decision awarding plaintiffs $386 mil-lion in damages," Pls.' Br. filed Dec.

18, 2006, at 43, plaintiffs have not shown that any acts attributable to the Government occurred within the six-year statute of limitations. The substance of plaintiffs' dispute with the United States has been the same for the last twenty-one years: plaintiffs seek additional compensation for damages caused by the Nuclear Testing Program. The amounts specified in the settlement agreement also were known to plaintiffs in 1986. The terms and conditions of the Changed Circumstances provision were known to plain-tiffs in 1986. The court cannot find now—twenty-one years after the Compact was entered into—that plaintiffs' claims are timely.

[812] In Counts III and IV, plaintiffs allege takings claims triggered by the passage of the Compact in 1986 and the failure adequately to fund the NCT. In *Juda II* Judge Harkins held open the possibility of future litigation on the adequacy of the alternative remedy provided for in the Compact Act:

> Whether the compensation, in the alternative procedures provided by Congress in the Compact Act, is adequate is dependent upon the amount and type of compensation that ultimately is provided through those procedures. Congress has recognized and protected plaintiffs' right to just compensation for takings and for breach of contract. The settlement procedure, as effectuated through the Section 177 Agreement, provides a "reasonable" and "certain" means for obtaining compensation. Whether the settlement provides "adequate" compensation cannot be determined at this time.

Juda II at 689. The Federal Circuit endorsed this analysis in *People of Enewetak*, again acknowledging a

possibility of future litigation on plaintiffs' Fifth Amendment takings claims. 864 F.2d at 136 ("[W]e are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate.").

Plaintiffs maintain that these takings claims are now ripe for litigation because plaintiffs have exhausted the alternative procedure mandated in the Compact Act. They assert that "the government completely ignores this Court's prior ruling that plaintiffs' claims were unripe .... This Court found plaintiffs' constitutional challenge to the Compact Act 'premature' and made clear that plaintiffs could return to this Court after the alternative procedure 'has run its course' should the compensation provided be inadequate." Pls.' Br. filed Dec. 18, 2006, at 43. The court finds that litigation on this issue is still premature. The alternative procedure in the Compact Act and in Article IX of the Section 177 Agreement included a Changed Circumstances provision, which allocated to Congress the option to "authorize and appropriate funds" in the event that "loss or damage to property and person of the citizens of the Marshall Islands, resulting from the nuclear testing program arises or is discovered after the effective date" of the Compact Act and Changed Circumstances provision.

Congress has not yet exercised its option to "authorize and appropriate funds" for the Marshall Islands. The court is in no position to find that the alternative procedure, as contemplated by the Compact Act, has run its course. Congress must consider the Changed Circumstances Request and take such action as it deems appropriate. That Congress has not acted in the seven years after the Changed Circumstances Request was first submitted would not warrant a finding of ei-

ther futility or *de facto* rejection, given the court's alternate ruling on the political question that this matter presents.

1. Equitable estoppel

Plaintiffs would estop defendant from arguing that the statute of limitations bars their claims. They insist that (1) a dismissal based on the statute of limitations would be an unconstitutional "bait and switch," because the court in *Peter II* and *People of Enewetak* dismissed plaintiffs' claims as premature, and (2) the Government cannot invoke the statute of limitations now that the alternative procedure has run its course. Pls.' Br. filed Dec. 18, 2006, at 38.

"Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59 (1984). To succeed on the grounds of equitable estoppel, generally a plaintiff must show that it "relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Id.* (footnotes omitted). This general rule, however, is not applicable against the Government: "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.*

> Although the Supreme Court has not adopted a per se rule prohibiting the application of equitable estoppel against the government under any circumstances, ... the Court has suggested that if equitable [813] estoppel is available at all against the government some form of affirmative misconduct must be shown in addition to the traditional requirements of estop-

> pel.... While the Supreme Court has not squarely held that affirmative misconduct is a prerequisite for invoking equitable estoppel against the government, this court has done so.

Zacharin v. United States, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (internal citations omitted); *see also Frazer v. United States*, 288 F.3d 1347, 1352-53 (Fed. Cir. 2002); *Tefel v. Reno*, 180 F.3d 1286, 1303 (11th Cir. 1999); *Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989).

Plaintiffs interpose constitutional limits to defendant's arsenal of objections: "[T]he Federal government cannot, consistent with due process, hold out the prospect of a later challenge to the adequacy of the NCT process and then declare that such a challenge necessarily comes too late." Pls.' Br. filed Dec. 18, 2006, at 37-38 (citing *Reich v. Collins*, 513 U.S. 106, 108 (1994)).

During oral argument and in their first supplemental brief, plaintiffs argued that defendant misled plaintiffs, and presumably the Federal Circuit, by assuring the Federal Circuit in 1988 during argument in *People of Enewetak* that, "'should changed circumstances arise which would prevent the program from functioning as planned, Congress would need to consider possible additional funding.'" Pls.' Br. filed May 23, 2007, at 16. "In contrast to its earlier assurances, despite evidence of substantial uncompensated and unforeseen harm, the government told Congress that 'the facts ... do not support a funding request under the 'changed circumstances' provision ...'" *Id.* (quoting 2005 Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America).

Review of the Consolidated Brief of Appellee the United States, *People of Enewetak v. United States*, Nos. 88-1206, -1207 & -1208 (Fed. Cir. June 24, 1988) (the "Appellee Brief"), shows that, while he served as Assistant Attorney General of the Lands and Natural Resources Division of the United States Department of Justice, Roger J. Marzulla advocated on behalf of the United States that plaintiffs might avail themselves of the Changed Circumstances provision in these circumstances.[5]

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[5] For example, the Government stated in the Appellee Brief: "The Section 177 Agreement, signed in conjunction with the Compact on June 25, 1983, has created a comprehensive, integrated compensation plan 'to provide, in perpetuity, a means to address past, present and future consequences of the nuclear Testing Program' (App. 332)." Appellee Brief at 9.

The Government elaborated upon this argument in Section III.A of the Appellee Brief, discussing the limited nature of the Changed Circumstances provision of the Section 177 Agreement:

> The objective of the Agreement is "to create and maintain *in perpetuity*, a means to address past, present and future consequences of the Nuclear Testing Program, including the resolution of resultant claims" (App. 331, emphasis supplied). As the cornerstone funding, the United States on October 30, 1986, immediately after the Compact took effect, paid $150 million to the Marshall Islands government to create the compensation Fund established by Article 1 (App. 1241). The Agreement requires, however, that the Fund be permanently invested, with an investment goal of at least $18 million per year (App. 332), and with all distributions for compensation programs and claims adjudication to come from the proceeds (App. 332). The Fund's principal may be drawn only if proceeds will not meet annual distribution schedules (App. 336). The Section 177 Agreement's funding structure is thus designed to operate as long as necessary until all consequences of the nuclear testing pro-

gram are addressed. The United States and Marshall Islands drafted the Agreement to provide continuous funding to *resolve*, not avoid, those consequences.

It is, of course, conceivable that the Fund could become depleted because of radical long-term investment difficulties, or substantial unforeseen damages. The Agreement expressly provides as to "Changed Circumstances," however, that (App. 341-342):

> If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, *and* such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

In any case, it was the best judgment of the United States and Marshall Islands government that the compensation plan as structured in the Agreement will equitably address all consequences of the nuclear testing program. The Agreement is designed to operate "in perpetuity," is currently operating effectively to address long-term needs, and fulfills the intent that complex problems stemming from the testing program be resolved on a permanent basis.

Appellee Brief at 34-35 (emphasis added; footnotes omitted). Thus, defendant told the appeals court that long-term investment difficulties might occur to render the Agreement's provisions "manifestly inadequate," but then quotes the language of the provision that requires that changed circumstances had to be unfore-

[814] In its brief filed nineteen years ago, defendant argues that the financial vagaries in the investment program—arguably including mismanagement—could qualify as a separate changed circumstance, apart from loss or damage. That is because the Appellee Brief acknowledges depletion of the Fund due to "long-term investment difficulties, or substantial unforeseen damages." Appellee Brief at 34; *see* note 5 *supra*.

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seeable. Note 33 of the Appellee Brief appears to assuage concerns regarding the adequacy of funding:

> As appellants note (Br. 44 n.47), disbursements were made from the Fund during its initial year in light of the recent stock market "correction" affecting all investors. That disbursement in no way impairs, nor do appellants suggest that it impairs, the long-term performance and viability of the Fund. Indeed, prior to the stock market disruption, the Fund was achieving an annual return of 20 percent. The amounts disbursed have since been partially restored, and it is anticipated will be fully restored in the near future. The Fund continues to operate as a long-term investment program, providing "a perpetual means of addressing the special and unique circumstances" arising from the nuclear testing program. (App. 332).

Id. at 34 n. 33.

Among the "changed circumstances" identified by counsel for plaintiffs in *People of Bikini*, No. 06-288C, was the ambitious, if not unrealistic, assumption that the Trust Fund had to generate a return of 12% per year to finance the $18 million earmarked for the various programs and specific financial commitments for each listed in the Compact, only one of which was the NCT. Counsel reasonably speculated that "[i]t was pretty hard when you've got to throw off 12 percent a year to make that corpus grow." Transcript of Proceedings at 146, *People of Bikini v. United States*, No. 06-288C, and *John v. United States*, No. 06-289L (Fed. Cl. Apr. 23, 2007).

Nonetheless, the shift in defendant's position does not merit its proscription as affirmative misconduct.

The argument in the Appellee Brief certainly includes statements that could be construed as assurances of the availability of future funding should the $150 million trust fund not prove sufficient. Yet, defendant did not misrepresent the Compact or the Section 177 Agreement. References to a "permanent alternative remedy," *see* Appellee Brief at 14, are accompanied by citations, either general or specific, to the language of the Section 177 Agreement. The language of the Changed Circumstances provision of Section 177 is not a blanket guarantee of future funding for the people of the Marshall Islands. The Changed Circumstances provision provides relief conditioned upon 1) the discovery of loss or damage to property after the effective date of the Agreement, 2) an unforeseeable qualifying event and 3) approval of Congress. While defendant did not misrepresent the terms of the Compact, the Federal Circuit was persuaded by defendant's argument and arguably overstated the breadth of the Changed Circumstances provision. *See People of Enewetak*, 864 F.2d at 135-36.

In any event, this rationale was not the predicate for the appeals court's affirmance of the Claims Court. Even if defendant was not forthcoming in its argument, invocation of equitable estoppel is not warranted. The Compact, in plain language, required a dual showing, not an alternative one; defendant quoted the Compact accurately; defendant argued that the Trust Fund was structured to be renewable in perpetuity. Plaintiffs were well aware of the terms of the Changed Circumstances provision and had ample opportunity to argue to the Federal Circuit that the clause did not allow re-

course to the courts should the Claims Tribunal render an award that could not be funded.[6]

[815]

2. Equitable tolling

Plaintiffs' alternative position, that the statute of limitations is subject to equitable tolling, also does not succeed, as plaintiffs do not meet the requirements of the doctrine with respect to Counts III, IV, V, and VI. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), established the current law involving the doctrine of equitable tolling against the Government:

> A waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver....
>
> ... Federal courts have typically extended equitable relief only sparingly. We have al-

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[6] Implicit in plaintiffs' reliance on defendant's advocacy is their objection that the RMI did not represent the inhabitants of the Marshall Islands, because the RMI had no power or right to accede to the Compact until the RMI became a recognized governmental entity. Judge Harkins in *Juda II* ruled that the validity of the espousal in Article X did not impact the withdrawal of claims effected by Article XII. *See Juda II* at 686-89; see also *People of Enewetak*, 864 F.2d at 137 (adopting Judge Harkins's "more extensive analysis.").

> lowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Id. at 95-96 (footnotes omitted); *Scarborough v. Principi*, 541 U.S. 401, 420-21 (2004) (discussing Court's rejection of "'unduly restrictive' construction of the statute of limitations under the Tucker Act" in *Franconia Associates v. United States*, 536 U.S. 129 (2002)); *Mapu v. Nicholson*, 397 F.3d 1375, 1379-80 (Fed. Cir. 2005) (denying equitable tolling of period for appeal).

Equitable tolling would be inappropriate in this case because plaintiffs neither filed a defective pleading during the statutory period, nor has the Government either induced or tricked plaintiffs into allowing the filing deadline to pass. In fact, the situation is to the contrary. Plaintiffs had a suit pending in the Claims Court when the RMI and the United States entered into the Compact in 1986. In *Peter II* plaintiffs had full opportunity to litigate the issue of subject matter jurisdiction in the Claims Court. *Peter II* at 692; *see also Juda II* at 689. Ultimately, the court found that jurisdiction had been withdrawn, but left open the question of whether the "settlement provides 'adequate' compensation" until the "amount and type of compensation that ultimately is provided" has been determined. *Juda II* at 689. Thus, the record does not disclose a basis for finding that the earlier pleadings were somehow defective,

such that the court now can consider equitable tolling with respect to Counts III, IV, V, and VI.

The essence of plaintiffs' argument concerning the statute of limitations is that the court in *Peter II* and *Juda II* ruled premature the issue of whether the Nuclear Claims Tribunal's process would provide just compensation to plaintiffs. Judge Harkins stated:

> This court, plaintiffs say, cannot uphold the constitutionality of Article XII without first making a determination that the settlement procedure, and Claims Tribunal established under the Section 177 Agreement, satisfy these constitutional requirements.
>
> These assertions are premature. Whether the compensation, the alternative procedure provided by Congress in the Compact Act is adequate is dependent upon the amount and type of compensation that ultimately is provided through those procedures. Congress has recognized and protected plaintiffs' rights to just compensation for takings and for breach of contract. The settlement procedure, as effectuated through the Section 177 Agreement, [816] provides a "reasonable" and "certain" means for obtaining compensation. Whether the settlement provides "adequate" compensation cannot be determined at this time.

Juda II at 689. The Claims Court dismissed plaintiffs' claim for breach of implied-in-fact contract because Congress intended to withdraw its consent to sue, a decision affirmed by the Federal Circuit. *Peter II* at 692; *People of Enewetak* at 136. It is a mischaracterization of the holdings in *People of Enewetak* and *Juda II* to

argue that all of the claims originally pleaded can be reviewed.

II. Failure to state a claim

Defendant argues that Counts III, IV, V, and VI would be subject to dismissal under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.

Count III and Count V plead a taking. The standard for determining whether a Fifth Amendment taking has occurred, as articulated in *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004), follows:

> First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment. *Maritrans*, 342 F.3d at 1351. "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt*, 271 F.3d at 1096 (citing, *inter alia*, *Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992)) ....
>
> Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest. *Chancellor Manor v. United States*, 331 F.3d 891, 902 (Fed. Cir. 2003) (citing *[M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995)]).

Id. at 1372.

Defendant charges that plaintiffs have not alleged the "occurrence of any Federal Government act since 1986 that has deprived them of any property interest." Def.'s Br. filed Sept. 18, 2006, at 33. Indeed, no acts on the part of the Government are alleged that could entitle plaintiffs to additional funds. The Compact and the Trust Fund established pursuant to settlement of plaintiffs' claims did not guarantee plaintiffs additional funding. *See* Changed Circumstances provision. Moreover, plaintiffs have alleged no affirmative government act that deprives them of any property interest in additional funding from the United States. *See D.R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505, 508 (Ct. Cl. 1967) ("All of the acts and omissions complained of by plaintiffs were those of the State of Ohio. It does not allege a single affirmative act on the part of defendant that deprived it of any of its property nor that interfered with or disturbed its property rights in any way. Without such allegation, plaintiff cannot recover damages from defendant on this theory.").

For similar reasons plaintiffs cannot establish the existence of an implied-in-fact contract for additional funds. In Count IV and Count VI plaintiffs allege a breach of implied-in-fact contracts based on the acts of the Government beginning in 1946 when the Government moved the People of Bikini off of their atoll. Any implied-in-fact contract that may have existed between the United States and the Enewetak people, as will be discussed, was terminated in 1986 by the Compact. Plaintiffs attempt to distinguish their new claims by arguing that defendant objects no new events are pleaded to "demonstrate[] the government's failure to acknowledge the new causes of action in plaintiffs' complaint," Pls.' Br. filed Dec. 18, 2006, at 48, which de-

volves to the tautology that something new must have occurred.

In order to maintain a claim based on an implied-in-fact contract, a plaintiff must show: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) *actual* [817] *authority on the part of the government's representative to bind the government.*" *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005). Any implied-in-fact contract pleaded in Count IV that may have existed before the Compact became effective was terminated by Section 127 of the Compact Act, which provides:

> Except as otherwise provided in this Compact or its related agreements, all obligations, responsibilities, rights and benefits of the Government of the United States as Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agreement to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact are no longer assumed and enjoyed by the Government of the United States.

Because the Section 177 Agreement "constitute[d] the full settlement of all claims, past present and future," a mutual intent to contract beyond the terms of the Compact and the Section 177 Agreement has not been pleaded that could avoid this all-encompassing language. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007); *Alliance of Descendants of Tex. Land Grants*, 37 F.3d at 1483.

Count VI, plaintiffs' claim arguing that the Compact itself constituted a breach of an implied-in-fact contract, cannot withstand judicial scrutiny. "The

overall purpose of the Compact Act must not be lost sight of. The thrust of the Compact Act is to discharge United States obligations to promote the development of the Marshall Island peoples toward self-government." *Juda II* at 683. As will be discussed, the United States validly withdrew its consent to be sued in the courts of the United States. *See* Section 177 Agreement, art. X § 1. Therefore, plaintiffs cannot pursue their implied-in-fact contract claim in Count IV or Count VI.

III. Res judicata

The task of a federal court when reviewing the sufficiency of the complaint for failure to state a claim "is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* When a complaint properly is within its jurisdiction, a court is to accept as true the facts alleged in the complaint, *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999), and to entertain all reasonable inferences in favor of the non-movant, *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). In *Twombly* the Supreme Court circumscribed the rule set in *Conley v. Gibson*, 355 U.S. 41, 45-46, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly* rejected a literal application of the language of *Conley*, stating that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." 127 S. Ct. at 1973 n.14.

Peter II dismissed the claims of plaintiffs because jurisdiction had been withdrawn and remitted them to an alternative remedy. In its motion to dismiss, defendant insists that "[p]laintiffs are barred by the doctrine of res judicata from relitigating the validity and effect of the jurisdiction-withdrawing provision of the Compact Act and Section 177 Agreement." Def.'s Br. filed Jan. 30, 2007, at 7 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979), and *Young Eng'rs, Inc. v. United States Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983)). Plaintiffs counter that "[t]he distinction between jurisdictional dismissals and dismissals on the merits is firmly established.... Jurisdictional dismissals are not claim preclusive." Pls.' Br. filed Dec. 18, 2006, at 33 (citing *Hughes v. United States*, 71 U.S. 232, 237 (1866); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Doe v. United States*, 463 F.3d 1314 (Fed. Cir. 2006); *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 640 (Fed. Cir. 1989); *Vink v. Hendrikus Johannes Schif, Rolkan,* [818] *N.V.*, 839 F.2d 676, 677 (Fed. Cir. 1988); and *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 687 n.10 (Fed. Cir. 1992)).

In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court stated:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, "[it] is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). The final "judgment puts an end to

> the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375, 378 (1940).

Id. at 129-30; see also *Epic Metals Corp. v. H.H. Robertson Co.*, 870 F.2d 1574, 1576 (Fed. Cir. 1989). "[B]ecause res judicata can also be used in the sense of any preclusion of litigation arising from a judgment, including collateral estoppel, when discussing the different concepts, courts, including the Ninth Circuit and [the Federal] Circuit, for clarity have substituted the terms 'claim preclusion' and 'issue preclusion.'" *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 478 (Fed. Cir. 1991). The Federal Circuit has defined claim preclusion: "[W]hen a judgment is rendered in favor of a party to litigation, the plaintiff may not thereafter maintain another action on the same 'claim,' and defenses that were raised or *could have been* raised by the defendant in that action are extinguished." *Id.* at 478. Whether a claim is barred by the doctrine of claim preclusion is an issue of law for the court to determine based upon the facts of the case. *Faust v. United States*, 101 F.3d 675, 677 (Fed. Cir. 1996).

> The doctrine of *res judicata*, in its claim preclusion form, provides that final judgment on a claim extinguishes "'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.'" *Young Eng'rs, Inc. v. United States Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (quoting Restatement (Second) of Judgments § 24 (1982)).

Hornback v. United States, 405 F.3d 999, 1001 (Fed. Cir. 2005); *see Container Transport Int'l, Inc. v. United States*, 468 F.2d 926, 928-29 (Ct. Cl. 1972).

Issue preclusion, or collateral estoppel, "bars litigation of an issue if an identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully represented." *Simmons v. Small Business Admin.*, 475 F.3d 1372, 1374 (Fed. Cir. 2007). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Issue preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Id.* at 95 (citing *Montana v. United States*, 440 U.S. 147, 153 (1979), and *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-29 (1971)).

Plaintiffs emphasize two Federal Circuit cases, *Do-Well*, 870 F.2d at 640, and *Spruill*, 978 F.2d at 687 n.10, for the proposition that the doctrine of res judicata does not bar their claims because *Juda II* is not a decision on the merits. In *Do-Well* the Federal Circuit noted in *dicta* that a "dismissal on the merits carries *res judicata* effect and dismissal for want of jurisdiction does not." *Id.* at 640 (citing *Vink*, 839 F.2d at 677). Likewise, in *Spruill* the Federal Circuit stated in *dicta*, "[w]hile the practical result of a dismissal for want of jurisdiction may in some cases be the [819] same as a dismissal for failure to state a claim, the legal consequences can be substantially different. The application of the principle of *res judicata* is just one example." 978 F.2d at 687 n.10.

Based on the following analysis,[7] the court concludes that the applicable bar is collateral estoppel, that the bar has been recognized to apply to dismissals for want of subject matter jurisdiction, and that it should be applied in this case.

It is well established that a dismissal for lack of jurisdiction does not constitute a final judgment on the merits and therefore has no res judicata effect. *See Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1369-70 (Fed. Cir. 2003) (holding that res judicata does not apply to dismissals based on lack of standing: "Because standing is jurisdictional, lack of standing precludes a ruling on the merits.")[8]; *Schafer v. Dep't of Interior*, 88 F.3d 981, 990 (Fed. Cir. 1996) ("This is a decision on the merits which, unlike dismissal for want of jurisdiction, has a res judicata effect."); *Vink*, 839 F.2d at 677 ("A dismissal for lack of subject matter jurisdiction ... is not a disposition on the merits and thus permits a litigant to refile in an appropriate forum."). The only possible bar that could be elicited from *Peter I*, *Peter II*, and *People of Enewetak* would arise from collateral estoppel. The question then becomes whether a plaintiff is collaterally estopped from litigating the question of subject matter jurisdic-

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[7] The analysis is taken almost verbatim from this court's decision in *Saladino v. United States*, 62 Fed. Cl. 782, 790-91 (2004).

[8] Although the Federal Circuit applied the law of the Ninth Circuit, this statement was set forth as a general proposition derived from Supreme Court precedent. *See Media Techs. Licensing*, 334 F.3d at 1369-70 (citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996)). Under the Federal Circuit's formulation of res judicata, *see Mother's Rest. v. Mama's Pizza, Inc.*, 723 F.2d 1566 (Fed. Cir. 1983), the result would be the same.

tion and/or standing based on materially indistinguishable allegations in a complaint that a court in a prior action had ruled to be insufficient to establish jurisdiction.

The Federal Circuit addressed this issue under slightly different circumstances. In *Ammex, Inc. v. United States*, 384 F.3d 1368, 1371-72 (Fed. Cir. 2004), the Federal Circuit ruled that a sister circuit's determination of a party's standing to pursue a tax refund claim for an amount that the party paid to its suppliers and not to the Federal Government collaterally estopped the taxpayer from pursuing the same claim for different tax years in the Court of Federal Claims. While *Ammex* can be read to give preclusive effect to threshold determinations such as standing, it should be noted that *Ammex* recognized that an appeals court determination provided the preclusive effect. *See id.*

Even if *Ammex* does not stand for the broad proposition, ample authority supports such a result. The Restatement (Second) of Judgments, which the Federal Circuit endorses in this context, *Foster v. Hallco Manufacturing Co.*, 947 F.2d 469, 477 n.7 (Fed. Cir. 1991), explicitly adopts the rules of issue preclusion to dismissals for lack of jurisdiction despite their lack of claim-preclusive effects. *See* Restatement (Second) of Judgments § 20, comment b (1982); *id.* § 12, comment c ("When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion.").

The Federal Circuit has issued rulings consistent with this result. *See, e.g.*, *Dana v. E.S. Originals, Inc.*, 342 F.3d 1320, 1323 (Fed. Cir. 2003) (applying Eleventh

Circuit law and quoting the Restatement (Second) of Judgments § 13, which states that, "for purposes of issue preclusion ... final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect"). In *International Air Response v. United States*, 302 F.3d 1363 (Fed. Cir. 2002), the Federal Circuit quoted broad language from a Supreme Court case stating that "the 'principles of res judicata also apply to jurisdictional determinations—both subject matter and personal.'" 302 F.3d at 1368 (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des* [820] *Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982)). However, the Federal Circuit applied this language narrowly to rule that the Government could not collaterally attack the issuance of a stay—a judgment on the merits—by now arguing that the prior court lacked jurisdiction to provide the requested relief. *Id.* at 1369 (foreclosing Government from arguing that claim not timely because district court had issued stay under All Writs Act, thereby tolling one-year statute of limitations).[9] The language taken from the Supreme Court, moreover, appeared in the context of a discussion on collateral attacks: "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ... reopen that question in a collateral attack upon on adverse judgment." *See Ins. Corp. of Ireland*, 456 U.S. at 702 n.9.

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[9] *But see Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1330-33 (Fed. Cir. 2004) (refusing to grant preclusive effect to sister circuit's judgment that issued without jurisdiction by excepting from bar judgments that, if allowed to stand, would "substantially infringe the authority of another tribunal" (quoting Restatement (Second) of Judgments, § 12(2))).

Even without this case law, this court would not be ruling in a legal environment devoid of guidance, as many federal courts preclude parties from relitigating the issue of subject matter jurisdiction or other threshold matters even though the prior dismissal did not adjudicate the merits of the case. *See, e.g., Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209-12 (10th Cir. 2001) (prohibiting relitigation of personal jurisdiction); *Cortes v. Intermedics, Inc.*, 229 F.3d 12, 14-15 (1st Cir. 2000) (same for jurisdiction on basis of federal preemption); *DiGiore v. Ryan*, 172 F.3d 454, 466 (7th Cir. 1999) (justiciability issues), *overruled on other grounds by Whetsel v. Network Prop. Servs.*, LLC, 246 F.3d 897 (7th Cir. 2001); *N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429, 433 (11th Cir. 1993) (subject matter jurisdiction); *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980) (jurisdiction); *cf. Okoro v. Bohman*, 164 F.3d 1059, 1062-64 (7th Cir. 1999) (allowing party to avoid bar of collateral estoppel from dismissal of prior action ruled frivolous because bar applied only to the precise ground of dismissal). Standing, a threshold matter like jurisdiction, is also entitled to issue-preclusive effect. *See, e.g., Cutler v. Hayes*, 818 F.2d 879, 888-89 (D.C. Cir. 1987); *Planned Parenthood Ass'n v. Kempiners*, 700 F.2d 1115, 1138 (7th Cir. 1983) (Posner, J., concurring); *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (8th Cir. 1981); *Mrazek v. Suffolk County Bd. of Elections.*, 630 F.2d 890, 896 n. 10 (2d Cir. 1980).

In accord with these authorities, this court applies collateral estoppel to "the precise issue of jurisdiction that led to the initial dismissal." *GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987).

Wright, Miller & Cooper have contributed a succinct justification for this result apropos of plaintiffs'

claims for a taking of property that were resolved previously:

> [C]ourts have found it convenient to identify the judgments that warrant preclusive effect as "final" or as "on the merits." Little harm is done by such phrases in themselves, but they may obscure the fundamental proposition that different requirements are appropriate to different preclusive effects. Dismissal of a suit for want of federal subject-matter jurisdiction, for example, should not bar an action on the same claim in a court that does have subject matter jurisdiction, but *ordinarily should preclude relitigation of the same issue of subject-matter jurisdiction in a second federal suit on the same claim.*

18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure Jurisdiction (Second) § 4402 (2007) (emphasis added). Thus, while plaintiffs are correct that the dismissal in *Peter II* for want of subject matter jurisdiction would not bar their claims filed in federal district court, the rule does not allow plaintiffs to renew suit in the Court of Federal Claims in order to relitigate the issue of subject matter jurisdiction with respect to reframed claims from the original *Peter* case.

Judge Harkins held in *Juda II*:

> In *Lynch*, the Supreme Court recognized the sweep of Congressional power to [821] withdraw the consent of the United States to be sued. That consent can be withdrawn at any time. Congressional power to provide, or withdraw, remedies against the United States is virtually without a limit. The Sovereign's im-

> munity from suit exists whatever the character of the proceeding, or the source of the right to be enforced. It applies alike to causes of action arising under acts of Congress and to those arising from some violation of rights conferred upon the citizens by the Constitution. Withdrawal of consent to sue on plaintiffs' claims does not imply repudiation. As long as the obligations are recognized, Congress may direct fulfillment without the interposition of either a court or an administrative tribunal. *Lynch v. United States*, 292 U.S. [571, 582 (1934)].

13 Cl. Ct. at 688-89. From this analytical premise, Judge Harkins concluded:

> Article XII of the Section 177 Agreement by necessary implication amends the Tucker Act. The consent of the United States to be sued in the Claims Court on plaintiffs' taking claims and breach of contract claims that arise from the United States' nuclear testing program in the Marshall Islands has been withdrawn.

Juda II at 690. In *People of Enewetak*, the Federal Circuit affirmed the holding in *Peter II* and *Nitol II*, and "adopt[ed the Claims Court's] more extensive analysis in *Juda v. United States*, 13 Cl. Ct. 667 (1987), relating to the issues discussed above." 864 F.2d at 137.

The above rulings preclude plaintiffs from relitigating subject matter jurisdiction regarding claims that were dismissed on the same grounds in prior litigation. Thus, Count I of plaintiffs' complaint is subject to dismissal based on the doctrine of collateral estoppel, as it is identical to Count I in *Peter I*, which was subject to dismissal for failure to allege a government act that oc-

curred within six years of the filing of the claim. *See Peter I* at 775. Also, Count II is subject to dismissal on collateral estoppel grounds, as the Federal Circuit affirmed the dismissal by the Claims Court for lack of subject matter jurisdiction due to the withdrawal of jurisdiction contained in the Section 177 Agreement. *See People of Enewetak*, 864 F.2d at 137.

Plaintiffs object that dismissal of their claims would "ignore[] the Federal Circuit's holding that such claims were 'premature.'" Pls.' Br. filed Dec. 18, 2007, at 11 (quoting *People of Enewetak*, 864 F.2d at 136). Plaintiffs rely on the Federal Circuit's adoption of the language in *Juda II* "[w]hether the settlement provides 'adequate' compensation cannot be determined at this time." *Juda II* at 689. Defendant responds that the Claims Court "merely concluded that it need not deal with an unripe issue" and that the Federal Circuit's statement did not hold that judicial intervention would be appropriate at a future date. Def.'s Br. filed Jan. 30, 2007, at 4. The court is not persuaded by defendant's argument that the express statements of the Federal Circuit and Claims Court were of no import. If all of plaintiffs' claims are subject to dismissal on the ground of collateral estoppel based upon the withdrawal of jurisdiction contained in the Section 177 Agreement, the statements by both the Federal Circuit and the Claims Court are rendered superfluous, so it would not be prudent to infer that either court commented without reason upon the prematurity of plaintiffs' claims for just compensation. This court concludes that the language of the *People of Enewetak* and *Juda II* opinions anticipated that plaintiffs might return to court on a claim regarding the adequacy of the compensation. At the same time, the affirmance of the dismissal due to the withdrawal of jurisdiction forecloses re-examination of

the identical claims raised in Peter, thereby preserving the collateral estoppel effect of the dismissal of Count I and Count II of plaintiffs' Amended Complaint.

The court interprets Counts III (unlawful taking of plaintiffs' just compensation claim) and IV (unlawful taking of plaintiffs' implied-in-fact contract claim) as challenging the adequacy of relief provided by the Compact of Free Association and the Section 177 Agreement to be contrary to the just compensation requirement of the Takings Clause: "The United States by failing to adequately fund the Tribunal so that it could pay Plaintiffs' [822] award has taken Plaintiffs' ... claim without providing the just compensation as required by the Fifth Amendment to the United States Constitution." Am. Compl. ¶ 203; Am. Compl. ¶ 207 (same). Therefore, these claims, while subject to dismissal for lack of subject matter jurisdiction, are not subject to dismissal under the issue preclusion component of res judicata. The language of the *People of Enewetak* and *Juda II* opinions indicates that no final judgment was reached regarding a challenge to the adequacy of the alternative relief; therefore, plaintiffs would not be barred from litigating this issue before this the Court of Federal Claims absent the statute of limitations.

IV. Withdrawal of jurisdiction

Defendant argues that the withdrawal of jurisdiction contained in Article XII of the Section 177 Agreement requires dismissal of plaintiffs' claims. The scope of the withdrawal of jurisdiction is "determined primarily by Compact Act §§ 103(g)(1) and (2), Compact § 177 and § 471(c), and the Section 177 Agreement, Article X, § 1 and Article XII." *Juda II* at 683. As the D.C. Circuit noted in *Antolok*:

> It is axiomatic in our federal jurisprudence that inferior courts ... have only that jurisdiction afforded them by Congress.... In 1850, a unanimous Supreme Court held that
>
> > [t]he Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the [inferior] Court[s]; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

873 F.2d at 373-74 (quoting *Sheldon v. Still*, 49 U.S. 441, 449 (1850)).

It is "well settled ... [t]hat the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts." *United States v. Babcock*, 250 U.S. 328, 331 (1919) (citations omitted). "[A]lthough a vested cause of action is property and is protected from arbitrary interference, ... no property, in the constitutional sense, [exists] in any particular form of remedy; all that ... is guaranteed by the Fourteenth Amendment is the preservation of [a] substantial right to redress by some effective procedure." *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933) (citations omitted).

The Supreme Court reviewed the breadth of jurisdiction granted to the Court of Claims in *Schillinger v. United States*, 155 U.S. 163, 166 (1894). "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies

in which the liability of the Government is submitted to the courts for judicial determination." *Id.* at 166. Based upon the doctrine of sovereign immunity, the Court reasoned:

> It is said that the Constitution forbids the taking of private property for public uses without just compensation; that, therefore, every appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States, and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the court of claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

[823] *Id.* at 168. This view was supported in *Lynch*, where the Supreme Court stated that "'contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action in-

dependent of the sovereign will.' The rule that the United States may not be sued without its consent is all-embracing." 292 U.S. at 580-81 (quoting The Federalist No. 81 (Alexander Hamilton)).

1. Withdrawal of jurisdiction in Article X of the Section 177 Agreement

The withdrawal of jurisdiction regarding claims that arise from the Nuclear Testing Program is an unambiguous express provision of the Section 177 Agreement. Article X, Section 1 of the Section 177 Agreement, quoted again for context, recites:

> This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

Article XII of the Section 177 Agreement provides:

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

2. Implied-in-fact contract claims and claims based on breach of fiduciary duty

Plaintiffs allege a breach of implied-in-fact contract and breach of fiduciary duties in Count II and Count VI, claims that are based upon the conduct of the United States in its treatment and care of the people of the RMI during the Nuclear Testing Program and other subsequent uses of Enewetak Atoll. While the court concludes that Count II is subject to dismissal under the doctrine of collateral estoppel and Count VI is subject to dismissal for failure to satisfy the six-year statute of limitations, the court addresses these counts under the alternative ground of withdrawal. In order to come within the jurisdiction of the Court of Federal Claims, the scope of claims covered by the withdrawal of jurisdiction contained in Article XII of the Section 177 Agreement must not reach these claims.

Count II alleges a breach of implied-in-fact contract created by the conduct of the United States in its treatment of plaintiffs following the occupation of the Marshall Islands in 1944. Plaintiffs allege that an implied-in-fact contract was formed by the "course of dealing between the parties and the circumstances of the removal placed obligations upon the United States toward the Enewetak people." Am. Compl. ¶ 194. They argue that "[t]he United States has breached its contract with the Enewetak people by failing to compensate them for the use of their atoll by the United States and failing to compensate them for the continued denied use of over half the land and lagoon of the atoll" following the Nuclear Testing Program. *Id.* ¶ 196.

Count VI alleges a breach of implied-in-fact fiduciary duties through formation of the Compact and the failure to fund the award issued by the NCT on March

5, 2001. A claim challenging the failure to fund the NCT is a claim that, on its face, is related directly to the Nuclear Testing Program.

Both Count II and Count VI involve claims that are based upon the Nuclear Testing Program and therefore are subject to dismissal pursuant to the withdrawal of jurisdiction contained in Article X and Article XII of the Section 177 Agreement. The withdrawal of jurisdiction over a claim based on an implied-in-fact contract against the United States, particularly in circumstances which implicate foreign relations, falls squarely [824] within the power of Congress. *See, e.g., Lynch*, 292 U.S. at 581 ("The rule that the United States may not be sued without its consent is all-embracing.").

3. Fifth Amendment claims

Plaintiffs assert four claims that are based upon their Fifth Amendment right to just compensation for private property taken for public use. Count I alleges a temporary taking of Enewetak Atoll beginning in December 1947 and extending through the next twenty to fifty years, based upon the Nuclear Testing Program and resulting damage done to Enewetak Atoll. Count III alleges a taking of plaintiffs' takings claim for the use and occupation through funding of the NCT with insufficient funds to provide just compensation. Count IV alleges an unlawful taking of plaintiffs' implied-in-fact contract by failing to fund the NCT. Count V alleges a taking of Enewetak Atoll through the formation of the Compact.

As the court has concluded that Counts V and VI fall outside of the Tucker Act's six-year statute of limitations and that Count I is barred by collateral estoppel, consideration of these claims is foreclosed. How-

ever, as the Claims Court and the Federal Circuit indicated that review of the adequacy of relief provided was not ripe in *Peter II* and *People of Enewetak*, the court addresses an alternative ground for dismissal should it be determined that Counts III and IV satisfy the applicable statute of limitations.

1) Taking of implied-in-fact contract claim

As support for Count IV, plaintiffs' claim for just compensation based upon the implied-in-fact contract created by the conduct of the United States following its occupation of the RMI in 1944, plaintiffs rely on the Supreme Court's holding in *Lynch*:

> Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

292 U.S. at 579 (internal citations omitted).

Because plaintiffs' constitutional claims, by their terms, are included in "all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program," Section 177 Agreement, art. X, § 1, defendant places plaintiffs' constitutional claims within the scope of the withdrawal of jurisdiction effected by Article XII of the Section 177 Agreement. Plaintiffs counter that, even if their claims are related to the Nuclear Testing Program, they constitute a property right that man-

dates the payment of just compensation under the Fifth Amendment and that their constitutional claims cannot be withdrawn from judicial review. Acknowledging that Congress may provide for an alternative forum for compensation, plaintiffs maintain that a Tucker Act claim challenging the constitutionality of the alternative relief has been preserved as a final resort for a Fifth Amendment claim for just compensation.

Defendant offers the binding precedent of the Court of Claims in *Gold Bondholders Protective Council, Inc. v. United States*, 676 F.2d 643 (Ct. Cl. 1982), in which plaintiff argued for Fifth Amendment compensation based upon the United States' failure to redeem a bond in gold. The court viewed *Lynch* as rejecting this proposition. "[T]he Supreme Court ruled directly to the contrary in its landmark decision in *Lynch v. United States*," *Gold Bondholders*, 676 F.2d at 647, and cited to *Lynch* for the proposition that

> [a]lthough consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration.

[825] *Id.* (citing *Lynch*, 292 U.S. at 581). Based on this precedent, the court concludes that Count IV is subject to dismissal, as Congress validly withdrew jurisdiction from the court under the Section 177 Agreement.

2) Taking of plaintiffs' takings claim

Plaintiffs also have alleged an improper taking of their right to just compensation under the Fifth

Amendment in Count III, a claim based upon a constitutional right, not a contract. This claim is thus distinguishable from *Lynch* and *Gold Bondholders*, and plaintiffs cite to case law in support of the proposition that the Court of Federal Claims must retain jurisdiction to review the adequacy of the alternative relief in the Section 177 Agreement.

The doctrine of constitutional avoidance is a rule of statutory construction that requires the court to "avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the [Supreme] Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades*, 485 U.S. 568, 575 (1988) (citations omitted). Plaintiffs' claim for the taking of Enewetak Atoll following its occupation, Count III of plaintiffs' complaint, must be dismissed based upon the statute of limitations. Because plaintiffs' claim for the taking of Enewetak Atoll cannot proceed, the constitutionality of foreclosing plaintiffs' legal suit is not reviewable. In other words, plaintiffs do not have a takings claim, so no taking of a non-existent takings claim could be actionable. The court declines to address "the difficult question of whether inferior courts may be barred by an act of Congress from review of constitutional challenges to statutes." *Antolok*, 873 F.2d at 378.

V. Political question

While discussion of the political question doctrine is not essential to decision due to the dispositive impediments to review of plaintiffs' claims, the court relies, as an alternative ground for dismissal, on application of

the political question doctrine to plaintiffs' challenge to the adequacy of relief contained in the Compact and the Section 177 Agreement. Thus, assuming, *arguendo*, that plaintiffs could prosecute a valid claim for review of the adequacy of the alternative relief provided by the Compact and the Section 177 Agreement that was not barred by the statute of limitations, was not subject to collateral estoppel, and would not be subsumed in the withdrawal of jurisdiction, the political question doctrine nevertheless would bar review of their claims.

The political question doctrine is founded upon the long-standing recognition that certain actions of the Government are committed to its political branches. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 167 (1803).

> The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature."

Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (footnote omitted)). The Supreme Court has emphasized the breadth of the doctrine's application to the arena of foreign relations, stating that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political

power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (citations omitted). "[A]ny policy toward aliens is vitally and intricately interwoven with ... the conduct of foreign rela-[826]tions, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). The subject of foreign policy, according to the Court, is one not readily conducive to judicial review:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (citations omitted). In the seminal case, *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court held that a political question was nonjusticiable—not competent subject matter for decision by the courts. *Id.* at 198-99. At the same time, the Court cautioned that

> it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

369 U.S. at 211-12.

1. Rulings of the Claims Court and the Federal Circuit

Although defendant has pressed the political question doctrine throughout the procedural history of these companion cases, it has not been addressed in the context of plaintiffs' challenge to the adequacy of the alternative relief provided by the Compact and the Section 177 Agreement. *Juda I* spoke to this issue, as follows:

> Defendant also specifically reserves its right to raise the defense that plaintiffs' claims are not justiciable in this court because they present a political question that is to be resolved in the context of government-to-government negotiations between the United States and the Republic of the Marshall Islands. Defendant points out that since 1979 the Bikinians have had a popularly elected constitutional government. In connection with the political question issue, it is noted that the Court of Claims, in recognition of the complexities and costs in time and effort inherent in

> claims based on government conduct of the type involved here, suggested special jurisdictional legislation that would permit a morally satisfactory resolution of ancient wrongs. *Kabua, Kabua v. United States*, 546 F.2d 381, 385 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 821 (1977).
>
> Neither the political question issue nor the espousal issue is decided at this time. The ratification process for the Compact has not been completed, and neither issue has been briefed fully.

Juda I at 445-46.

In *Juda II* Judge Harkins carried the procedural history forward:

> On March 4, 1986, in each case defendant filed motions to dismiss on the ground that the claims were non-justiciable because they now involve a political question. After objections from plaintiffs to piecemeal disposition of the remaining jurisdictional issues, a new schedule was established to provide a vehicle for accelerated briefing of all remaining jurisdictional issues that would ripen after the Compact became effective.
>
> On November 4, 1986, defendant filed amended motions to dismiss in each case. The amended motions added lack of jurisdiction over the subject matter as a ground for dismissal and argued that the Section [827] 177 Agreement divested the court of jurisdiction over plaintiffs' claims.

Juda II at 669-70. The Claims Court in *Peter II*, *Juda II*, and *Nitol II* dismissed the claims of the people of

the Marshall Islands on jurisdictional grounds without addressing the political question doctrine.

On appeal to the Federal Circuit, defendant raised the political question doctrine as "an alternative, and fundamental, ground for affirming the decisions below." Appellee Brief at 14-26. The Federal Circuit in *People of Enewetak*, however, declined to discuss the political question doctrine, stating that "[b]ecause we affirm the decision of the Claims Court to dismiss appellants' complaints for lack of subject matter jurisdiction, we need not address other issues." 864 F.2d at 136 n.4.

2. Ruling of the D.C. Circuit

Although the Claims Court and Federal Circuit did not rule on defendant's invocation of the political question doctrine, other courts in related cases have spoken to this issue. In *Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1989), the court gave the following preamble:

> The Ninth Circuit is holding in abeyance *Antolok v. Brookhaven Nat'l Laboratories*, No. 88-5749 (9th Cir. ordered held in abeyance Oct. 19, 1988), pending outcome of the instant appeal. In the lower court proceeding in that case, the District Court dismissed plaintiffs' claims as raising a nonjusticiable political question. *Antolok v. Brookhaven Nat'l Laboratories*, Nos. CV 82-2364, CV 82-4978 (C.D. Cal. Jan. 6, 1988).

Id. at 372 n.3. The D.C. Circuit in *Antolok* affirmed the dismissal of the tort claims brought pursuant to the FTCA by the lower court. 873 F.2d at 369. The D.C. Circuit held that, "[i]f there is an uncompensated or inadequately compensated taking, then plaintiffs' remedy is in the Claims Court under the Tucker Act, 28 U.S.C.

§ 1491(a)(1), not in District Court under the Federal Tort[] Claims Act." *Id.* at 378. Chief Judge Wald's concurring opinion distinguished the claims addressed in *Antolok* from those raised in the case at bar. *See id.* at 393 n.15 ("This takings claim should be distinguished from the takings claim at issue in *People of Enewetak v. United States*, 864 F.2d 134 (Fed. Cir. 1988).... Here the plaintiffs' cause of action is a tort claim under the Federal Tort Claims Act.") (Wald, J., concurring). Nevertheless, a close parallel can be drawn between the FTCA claims brought in *Antolok* and the breach of implied-in-fact contract claims in this case, as they do not raise issues of constitutional dimension.

Judge Sentelle offered the lone caveat in *Antolok* concerning the political questions implicated: "[E]ven if we err in our interpretation of that Act, I would not reach the merits but would conclude that the District Court was without jurisdiction over this matter of international relations by reason of the political question doctrine." *Id.* at 379.[10]

> Judge Sentelle reasoned that the application of
>
> the three inquiries more recently formulated by Justice Powell as defining the analysis [are] necessary to determine the application of the political question doctrine.
>
> (i) Does the issue involve resolution of questions com-mitted by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial ex-

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[10] *See supra* note 3.

> pertise? (iii) Do prudential considerations counsel against judicial intervention?
>
> *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

Antolok, 873 F.2d at 381.

Judge Sentelle concluded, under the first criterion, that "the decision of the political branches expressed in the Compact negotiated and entered by the Executive and approved by the Legislative Branch is within the area of foreign relations committed by the Constitution to the political branches." *Id.* at 381. He analogized the circumstances to the "Litinov Assignment" at issue in *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 [828] (1937), categorizing the claims as challenging the recognition of foreign governments and therefore committed to the "'political department of the government.'" *Antolok*, 873 F.2d at 382 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938)). In applying the second criterion, Judge Sentelle rejected characterization of the claims as addressing "simpl[e] questions of tort liability and damages." *Id.* at 383. Rather, "[i]t is the political nature of the recognition question, not the tort nature of the individual claims, that bars our review and in which the Judiciary has no expertise." *Id.* at 383-84. Finally, with respect to the third criterion, Judge Sentelle concluded that "prudential considerations underline the necessity for the application of the [political question] doctrine in this case." *Id.* at 384. He reasoned that, "[f]or the courts of the United States to find the political branches, acting together, to have been impotent in the entry of recognition of the Marshall Islands would not only drain that voice of its power, but could 'imperil the amicable relations between governments and vex

the peace of nations.'" *Id.* at 384 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918)).

Chief Judge Wald, concurring in the result, stated, "I believe that Judge Sentelle's political question analysis is deeply flawed." *Id.* at 390 (Wald., J., concurring). "If the plaintiffs were attacking the espousal on the ground that the purported government of the Marshall Islands was not truly sovereign, then I would agree that a political question had been posed.... I also believe that any challenge to the adequacy of the settlement is nonjusticiable." *Id.* at 391. Nonetheless, she concluded that plaintiffs' challenge to the espousal based upon international law that "forbids the espousal of claims held by persons who were not nationals of the espousing state at the time the claims arose .... [is] entirely suitable for judicial resolution." *Id.* Chief Judge Wald distinguished plaintiffs' challenge as a "pure question of law which requires no foreign policy expertise and implicates no uniquely political concerns." *Id.* She demurred nevertheless that "this court is precluded from inquiring into the adequacy of the settlement," *id.* at 392, and that "[s]uch a dispute would seem to lie beyond the purview of this court, both because this court lacks the authority to inquire into the adequacy of another government's representation of its own people, and because the United States Government cannot in any event be held responsible for another government's failings." *Id.* Importantly, Chief Judge Wald commented on the practical consequences of judicial examination of the award:

> [A]ny inquiry into the adequacy of the settlement figure would require, in essence, that the district court try the lawsuit. The adequacy of the settlement, after all, depends both on the extent of the plaintiffs' injuries—a very diffi-

> cult determination in itself—and on the likelihood of their collecting a judgment in the face of the government's formidable defenses. The whole point of the espousal, however, was to achieve expeditious settlement of these claims and avoid protracted litigation. I believe that Congress did intend for the withdrawal of federal jurisdiction over the tort claims to be contingent on the validity of the espousal. But it would seem to me a bizarre result if we could uphold the espousal only after completing the sort of extended inquiry which the settlement was designed to prevent.

Id. at 393 (footnote omitted).

3. Political question doctrine applied to the case at bar

The Federal Circuit has adopted the six-factor inquiry set forth by the Supreme Court in *Baker v. Carr*.

> In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court set forth six tests for the presence of a nonjusticiable political question:
>
> > [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution [829] without expressing lack of the respect due coordinate branches of the gov-

> ernment; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> ....
>
> The decision that a question is nonjusticiable is not one courts should make lightly. Although each Baker test is independent, *id.*, we must satisfy ourselves that at least one of the six Baker tests is inextricably present in the facts and circumstances in this case before we may conclude that it presents a nonjusticiable political question, *Baker*, 396 U.S. at 217.

El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1361-62 (Fed. Cir. 2004); *see also Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Defendant characterizes plaintiffs' claims as involving an "attack upon the Compact and the Section 177 Agreement—agreements that were negotiated and executed by the Executive Branch and approved by Congress—[calling] into question the conduct of U.S. foreign relations." Def.'s Br. filed Sept. 18, 2006, at 21. Defendant would subject plaintiffs' claims to dismissal under the political question doctrine because they implicate the first, fourth, and sixth *Baker* factors.

Because defendant sees "a textually demonstrable constitutional commitment of the issue to a coordinate political department" to conduct of foreign relations involving the United States. *Baker*, 369 U.S. at 217, defendant advocates Judge Sentelle's application of the political question doctrine as an alternative ground for dismissal in *Antolok*. *See Antolok*, 873 F.2d at 379-94

(opinion of Sentelle, J.). Defendant highlights Judge Sentelle's reliance on the Supreme Court's treatment of the "Litinov Assignment" in *Belmont*, 301 U.S. at 330, and *Pink*, 315 U.S. at 229, as pretermitting judicial review regarding the formation of international agreements or recognition of foreign governments.

Plaintiffs respond with case law that supports the adjudication of takings claims as a core judicial function, "one traditionally and historically committed to the judiciary for resolution." Pls.' Br. filed Dec. 18, 2006, at 34. Plaintiffs rely upon *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985), for the proposition that "consideration of land taking claims is clearly the role of the judiciary according to the Constitution, Amendment V, and ascertainment of 'just compensation' is a judicial function." *Id.* at 1569 (citing *United States v. New River Colleries*, 262 U.S. 341, 343 (1923)). The Supreme Court viewed the issue in *Lynch* somewhat differently:

> Contracts between individuals or corporations are impaired within the meaning of the Constitution (article 1, s 10, cl. 1) whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. *Compare Principality of Monaco v. Mississippi*, 292 U.S. 313 [(1934)]. ["]The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.["] The rule that the United States may not be sued without its consent is all-embracing.

292 U.S. at 580-81 (footnotes omitted). This binding precedent translates to the proposition that withdrawal of jurisdiction regarding plaintiffs' claims for breach of implied-in-fact contract does not create a claim for just compensation under the Fifth Amendment.

Plaintiffs place great reliance on *Dames & Moore v. Regan*, 453 U.S. 654 (1981), purportedly factually similar to their case, as authority that their claims do not pose a nonjusticiable political question. *Dames & Moore* is distinguishable from this case. As the Supreme Court delineated in its opinion, resolution of the issue on review was limited to the "narrowest possible ground capable of deciding the case.... We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of [830] the case." 453 U.S. at 660-61. Judge Sentelle's treatment of a similar argument raised in *Antolok* is instructive:

> *Dames & Moore* is not authority for the proposition that we can review the political decision to recognize the government of the Republic of the Marshall Islands on terms including the settlement condition but rather is new authority for the old proposition that we are not the overseers of the political branches in the exercise of their governing responsibility.

873 F.2d at 384.

The dispute precipitating *Dames & Moore* arose out of an agreement entered into between the United States and the Islamic Republic of Iran on January 19, 1981, which secured the release of American hostages. The pivotal issues in the litigation "involve[d] various Executive Orders and regulations by which the Presi-

dent nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal." 453 U.S. at 660. A United States corporation had filed suit against the Islamic Republic of Iran, the Atomic Energy Organization of Iran, and Iranian banks for services performed under a contract with the Atomic Energy Organization. The petitioners in *Dames & Moore* had no involvement in the negotiation of the Executive Orders and regulations, nor did they ratify them through a democratic process. In contrast, plaintiffs are not United States citizens; they are foreign nationals who participated in both the negotiation of the Compact through their representatives and in the espousal of their claims by expressing support for the agreement through plebiscite in September 1983.

Defendant admonishes that resolution of the issues raised by plaintiffs would manifest a lack of respect due the Executive and Legislative branches of government. Defendant warns that judicial intervention would "signal to Congress this Court's belief that Congress will not appropriately act upon the Marshall Islands' changed circumstances request." Def.'s Br. filed Sept. 18, 2006, at 24. Also, defendant predicts that the court may "render a decision that directly conflicts with Congress' disposition of the Changed Circumstances Request, causing confusion, embarrassment, and more litigation." *Id.* Plaintiffs rejoin that their claims involve the payment of just compensation for use of private property, not foreign policy concerns. Plaintiffs cite to *United States v. Munoz-Flores*, 495 U.S. 385 (1990), in which the Supreme Court recognized:

> The Government may be right that a judicial finding that Congress has passed an unconsti-

> tutional law might in some sense be said to entail a "lack of respect" for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.

Id. at 390.

While respectful of Judge Sentelle's analysis, the court concludes that adoption of portions of Chief Judge Wald's discussion of the political question doctrine regarding the FTCA is more appropriate to the resolution of plaintiffs' claims under the Tucker Act. As quoted above, Chief Judge Wald cautioned in *Antolok* that

> any inquiry into the adequacy of the settlement figure would require, in essence, that the district court try the lawsuit. The adequacy of the settlement, after all, depends both on the extent of the plaintiffs' injuries—a very difficult determination in itself—and on the likelihood of their collecting a judgment in the face of the government's formidable defenses. The whole point of the espousal, however, was to achieve expeditious settlement of these claims and avoid protracted litigation. I believe that Congress did intend for the withdrawal of federal jurisdiction over the tort claims to be contingent on the validity of the espousal. But it would seem to me a bizarre result if we could uphold the espousal only after completing the sort of extended inquiry which the settlement was designed to prevent.

[831] 873 F.2d at 393 (Wald, J., concurring) (footnotes omitted).

Exploring plaintiffs' challenges to the adequacy of the alternative relief would require a trial on the merits of plaintiffs' claims and scrutiny of an international agreement that both recognized the formation of a foreign state and espoused claims of its nationals. As Chief Judge Wald explained, a challenge narrowly based upon a "purely legal question[]," such as the challenge to the ability of a foreign state validly to espouse claims of its nationals under international law, would not be subject to the political question doctrine. *Antolok*, 873 F.2d at 392. Resolution of plaintiffs' claims concerning the adequacy of the alternative relief, in contrast, would call for the court to retry plaintiffs' claims before the NCT in order to determine the adequacy of the award as a constitutional measure. Judicial resolution of complex issues of fact to determine whether the NCT's award constitutes just compensation and whether the United States is obligated to pay just compensation (either based on that award or its judicial proxy), would run counter to the final resolution of all plaintiffs' claims embodied in the Compact and the Section 177 Agreement.

The court recognizes "a textually demonstrable constitutional commitment of the issue to a coordinate political department," based upon the factual similarities to the Supreme Court's treatment to the Litinov Assignment in *Belmont*, 301 U.S. at 330, and in *Pink*, 315 U.S. at 229. *See Baker*, 369 U.S. at 217. Review of plaintiffs' claims regarding the adequacy of compensation under the Section 177 Agreement and the NCT would explore the formation of an international agreement and recognition of a foreign government, responsibilities charged to the Executive and Legislative branches of government.

In *Belmont* the Supreme Court reviewed the impact of the political question doctrine upon the challenge to the Litinov Assignment, which "br[ought] about a final settlement of the claims and counterclaims between the Soviet government and the United States; and it was agreed that the Soviet government would take no steps to enforce claims against American nationals; but all such claims were released and assigned to the United States." 301 U.S. at 326. Similar to the circumstances in this case, "coincident with the assignment set forth in the complaint, the President recognized the Soviet government, and normal diplomatic relations were established between that government and the government of the United States." *Id.* at 330. The Supreme Court's description of the nature of the agreement aids in placing plaintiffs' claims in their proper context:

> The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.

Id.

Plaintiffs' objections to the adequacy of the settlement's terms call for an examination of the terms of the "international compact between the two governments" and investigation of complex issues of fact, not a narrow legal issue. *See id.* at 326. In *Ozanic v. United States*, 188 F.2d 228 (2d Cir. 1951), Judge Learned Hand addressed the ability of the President to settle foreign claims arising out of the recognition of the Yugoslav government:

> The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends [832] upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.

Id. at 231 (footnote omitted). These factors support the conclusion that plaintiffs' claims impinge on the conduct of foreign affairs that the Constitution delegates to the Executive and Legislative branches. Moreover, the approval of the settlement terms by plebiscite in September 1983 would support a ruling that any dissatisfaction with the terms of the Compact and the Section 177 Agreement should be directed to the government of the RMI, not that of the United States.

Even if plaintiffs' claims could survive the bar of the statute of limitations, the preclusive effect of collateral estoppel, and withdrawal of jurisdiction, the politi-

cal question doctrine mandates declining judicial review of a challenge to the adequacy of the alternative relief afforded and delimited by the Compact Act and the Section 177 Agreement.

CONCLUSION

Based on the foregoing, defendant's motion is granted, and the Clerk of the Court shall dismiss Count III, IV, V, and VI of plaintiffs' Amended Complaint without prejudice for lack of subject matter jurisdiction and shall enter judgment for defendant with respect to Counts I and II.

IT IS SO ORDERED.

No costs.

/s/Christine O.C. Miller
Christine Odell Cook Miller
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2007-5176

ISMAEL JOHN, JACKSON ADING, JAMES GIDEON, KUNIO JOSEPH, HARRY JACKSON, BOAZ DAVID, SAM LEVAI, BALIKEN JACKSON, DAVID OBET, KOSIMA JOHANNES, JINET LANGRUS, EBEL JOSEPH, GEORGE YOSHITARO, ISAHO LUTHER, BIKENJI PAUL, NEPTALI PETER, AND MOSES ABRAHAM, FOR THEMSELVES AND FOR A CLASS CONSISTING OF THE PEOPLE OF ENEWETAK,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Stamp:
FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
May 27, 2009
Jan Horbaly
Clerk

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellants, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that

heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 3, 2009.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 05/27/2009

cc: Jonathan G. Cedarbaum
Brian M. Simkin

JOHN V US, 2007-5176
(CFC—06-CV-289)

APPENDIX D

PUBLIC LAW 99-239

Jan. 14, 1986
H.J. Res. 187

[99 Stat. 1770]

JOINT RESOLUTION

To approve the "Compact of Free Association", and for other purposes.

Whereas the United States, in accordance with the Trusteeship Agreement, the Charter of the United Nations and the objectives of the international trusteeship system, has promoted the development of the peoples of the Trust Territory toward self-government or independence as appropriate to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned; and

Whereas the United States, in response to the desires of the peoples of the Federated States of Micronesia and the Marshall Islands expressed through their freely-elected representatives and by the official pronouncements and enactments of their lawfully constituted governments, and in consideration of its own obligations under the Trusteeship Agreement to promote self-determination, entered into political status negotiations with representatives of the peoples of the Federated States of Micronesia, and the Marshall Islands; and

Whereas these negotiations resulted in the "Compact of Free Association" which, together with its related

agreements, was signed by the United States and by the Federated States of Micronesia and the Republic of the Marshall Islands on October 1, 1982 and June 25, 1983, respectively; and

Whereas the Compact of Free Association was approved by majorities of the peoples of the Federated States of Micronesia and the Marshall Islands in United Nations-observed plebiscites conducted on June 21, 1983 and September 7, 1983, respectively; and

Whereas the Compact of Free Association has been approved by the Governments of the Federated States of Micronesia and the Marshall Islands in accordance with their respective constitutional processes, thus completing fully for the Federated States of Micronesia and the Marshall Islands their domestic approval processes with respect to the Compact as contemplated in Compact Section 411: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This joint resolution, together with the Table of Contents in subsection (b) of this section, may be cited as the "Compact of Free Association Act of 1985".

(b) TABLE OF CONTENTS.—The table of contents for this joint resolution is as follows:

TITLE I—APPROVAL OF COMPACT; INTERPRETATION OF, AND UNITED STATES POLICIES REGARDING, COMPACT; SUPPLEMENTAL PROVISIONS

Sec. 101. Approval of Compact of Free Association.
(a) Federated States of Micronesia.

(b) Marshall Islands.
(c) Reference to the Compact.
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(d) Amendment, Change, or Termination in the Compact and Certain Agreements.
(e) Subsidiary Agreements Deemed Bilateral.
(f) Effective Date.
Sec. 102. Agreements With Federated States of Micronesia.
(a) Law Enforcement Assistance.
(b) Economic Development Plans Review Process.
(c) Agreement on Audits.
Sec. 103. Agreements With and Other Provisions Related to the Marshall Islands.
(a) Law Enforcement Assistance.
(b) Economic Development Plans Review Process.
(c) Ejit.
(d) Kwajalein Payments.
(e) Section 177 Agreement.
(f) Nuclear Test Effects.
(g) Espousal Provisions.
(h) DOE Radiological Health Care Program; USDA Agricultural and Food Programs.
(i) Rongelap.
(j) Four Atoll Health Care Program.
(k) Enjebi Community Trust Fund.
(l) Bikini Atoll Cleanup.
(m) Agreement on Audits.
Sec. 104. Interpretation of and United States Policy Regarding Compact of Free Association.

(a) Human Rights.
(b) Immigration.
(c) Nonalienation of Lands.
(d) Nuclear Waste Disposal.
(e) Impact of Compact on U.S. Areas.
(f) Fisheries Management.
(g) Foreign Loans.
Sec. 105. Supplemental Provisions.
(a) Domestic Program Requirements.
(b) Relations With the Federated States of Micronesia and the Marshall Islands.
(c) Continuing Trust Territory Authorization.
(d) Medical Referral Debts.
(e) Survivability.
(f) Registration for Agents of Micronesian Governments.
(g) Noncompliance Sanctions.
(h) Continuing Programs and Laws.
(i) College of Micronesia; Education Programs.
(j) Trust Territory Debts to U.S. Federal Agencies.
(k) Use of DOD Medical Facilities.
(l) Technical Assistance.
(m) Prior Service Benefits Program.
(n) Indefinite Land Use Payments.
(o) Communicable Disease Control Program.
(p) Trust Funds.
(q) Annual Reports on Determinations Under Compact Section 313.
(r) User Fees.
Sec. 106. Construction Contract Assistance.
(a) Assistance to U.S. Firms.

(b) Authorization.
Sec. 107. Limitations.
(a) Prohibition.
(b) Termination.
Sec. 108. Transitional Immigration Rules.
(a) Citizen of Northern Mariana Islands.
(b) Termination.
Sec. 109. Timing.
Sec. 110. Implementation of Audit Agreements.
(a) Transmission of Annual Financial Statement.
(b) Annual Audits By the President.
(c) Authority of GAO.
Sec. 111. Compensatory Adjustments.
(a) Additional Programs and Services.
(b) Investment Development Funds.
(c) Board of Advisors.
(d) Further Amounts.

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TITLE II—COMPACT OF FREE ASSOCIATION

Sec. 201. Compact of Free Association.

Title One—Governmental Relations

Article I—Self-Government.
Article II—Foreign Affairs.
Article III—Communications.
Article IV—Immigration.
Article V—Representation.
Article VI—Environmental Protection.
Article VII—General Legal Provisions.

Title Two—Economic Relations

Article I—Grant Assistance.
Article II—Program Assistance.
Article III—Administrative Provisions.

Article IV—Trade.
Article V—Finance and Taxation.

Title Three—Security and Defense Relations

Article I—Authority and Responsibility.
Article II—Defense Facilities and Operating Rights.
Article III—Defense Treaties and International Security Agreements.
Article IV—Service in Armed Forces of the United States.
Article V—General Provisions.

Title Four—General Provisions

Article I—Approval and Effective Date.
Article II—Conference and Dispute Resolution.
Article III—Amendment.
Article IV—Termination.
Article V—Survivability.
Article VI—Definition of Terms.
Article VII—Concluding Provisions.

Sec. 202. Jurisdiction.

TITLE III—PACIFIC POLICY REPORTS

Sec. 301. Findings.
Sec. 302. Reports.
(a) Submission.
(b) Contents.
Sec. 303. Conference.
(a) Meeting.
(b) Participants.
(c) Written Comments.
Sec. 304. Administrative Matters.
(a) Administrative Support.
(b) Authorization of Appropriations.

TITLE IV—CLARIFICATION OF CERTAIN TRADE AND TAX PROVISIONS OF THE COMPACT

Sec. 401. Freely Associated States Tariff Treatment.
(a) Section 242.
(b) Section 243.
Sec. 402. Construction of Section 253 of the Compact.
Sec. 403. Construction of Section 254 of the Compact.
Sec. 404. Construction of Section 255 of the Compact.
Sec. 405. The Marshall Islands and the Federated States of Micronesia Treated as North American Area.
Sec. 406. Effective Date.
Sec. 407. Study of Tax Provisions.
Sec. 408. Coordination With Other Provisions.

TITLE V—COMPACT OF FREE ASSOCIATION WITH PALAU

Sec. 501. Approval In Principle of the Compact.
Sec. 502. Modifications of the Compact.

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TITLE I—APPROVAL OF COMPACT; INTERPRETATION OF, AND U.S. POLICIES REGARDING, COMPACT; SUPPLEMENTAL PROVISIONS

SECTION 101. APPROVAL OF COMPACT OF FREE ASSOCIATION.

(a) FEDERATED STATES OF MICRONESIA.—The Compact of Free Association set forth in title II of this joint resolution between the United States and the Government of the Federated States of Micronesia is hereby approved, and Congress hereby consents to the

subsidiary agreements as set forth on pages 115 through 391 of House Document 98-192 of March 30, 1984, as they relate to such Government. Subject to the provisions of this joint resolution, the President is authorized to agree, in accordance with section 411 of the Compact, to an effective date for and thereafter to implement such Compact, having taken into account any procedures with respect to the United Nations for termination of the Trusteeship Agreement.

(b) MARSHALL ISLANDS.—The Compact of Free Association set forth in title II of this joint resolution between the United States and the Government of the Marshall Islands is hereby approved, and Congress hereby consents to the subsidiary agreements as set forth on pages 115 through 391 of House Document 98-192 of March 30, 1984, as they relate to such Government. Subject to the provisions of this joint resolution, the President is authorized to agree, in accordance with section 411 of the Compact, to an effective date for and thereafter to implement such Compact, having taken into account any procedures with respect to the United Nations for termination of the Trusteeship Agreement.

(c) REFERENCE TO THE COMPACT.—Any reference in this joint resolution to "the Compact" shall be treated as a reference to the Compact of Free Association set forth in title II of this joint resolution.

(d) AMENDMENT, CHANGE, OR TERMINATION IN THE COMPACT AND CERTAIN AGREEMENTS.—(1) Mutual agreement by the Government of the United States as provided in the Compact which results in amendment, change, or termination of all or any part thereof shall be effected only by Act of Congress and no unilateral action by the Government of the United

States provided for in the Compact, and having such result, may be effected other than by Act of Congress.

(2) The provisions of paragraph (1) shall apply—

(A) to all actions of the Government of the United States under the Compact including, but not limited to, actions taken pursuant to sections 431, 432, 441, or 442;

(B) to any amendment, change, or termination in the Agreement between the Government of the United States and the Government of the Federated States of Micronesia Regarding Friendship, Cooperation and Mutual Security Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association referred to in section 462(j) of the Compact and the Agreement between the Government of the United States and the Government of the Marshall Islands Concerning Mutual Security Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association referred to in section 462(k) of the Compact;

(C) to any amendment, change, or termination of the agreements concluded pursuant to Compact sections 175, 177, and [1774] 221(a)(5), the terms of which are incorporated by reference into the Compact; and

(D) to the following subsidiary agreements, or portions thereof:

(i) Article II of the agreement referred to in section 462(a) of the Compact;

(ii) Article II of the agreement referred to in section 462(b) of the Compact;

(iii) Article II and Section 7 of Article XI of the agreement referred to in section 462(e) of the Compact;

(iv) the agreement referred t[o] in section 462(f) of the Compact;

(v) Articles III and IV of the agreement referred to in section 462(g) of the Compact;

(vi) Article III and IV of the agreement referred to in section 462(h) of the Compact; and

(vii) Articles VI, XV, and XVII of the agreement referred to in section 462(i) of the Compact.

(e) SUBSIDIARY AGREEMENTS DEEMED BILATERAL.—For purposes of implementation of the Compact and this joint resolution, each of the subsidiary agreements referred to in subsections (a) and (b) (whether or not bilateral in form) shall be deemed to be bilateral agreements between the United States and each other party to such subsidiary agreement. The consent or concurrence of any other party shall not be required for the effectiveness of any actions taken by the U[ni]ted States in conjunction with either the Federated States of Micronesia or the Marshall Islands which are intended to affect the implementation, modification, suspension, or termination of any such subsidiary agreement (or any provision thereof) as regards the mutual responsibilities of the United States and the party in conjunction with whom the actions are taken.

(f) EFFECTIVE DATE.—(1) The President shall not agree to an effective date for the Compact, as authorized by this section, until after certifying to Congress that the agreements described in section 102 and section 103 of this title have been concluded.

(2) Any agreement concluded with the Federated States of Micronesia or the Marshall Islands pursuant to sections 102 and 103 of this title and any agreement which would amend, change, or terminate any subsidiary agreement or portion thereof as set forth in paragraph (4) of this subsection shall be submitted to the Congress. No such agreement shall take effect until after the expiration of 30 days after the date such agreement is so submitted (excluding days on which either House of Congress is not in session).

(3) No agreement described in paragraph (2) shall take effect if a joint resolution of disapproval is enacted during the period specified in paragraph (2). For the purpose of expediting the consideration of such a joint resolution, a motion to proceed to the consideration of any such joint resolution after it has been reported by an appropriate committee shall be treated as highly privileged in the House of Representatives. Any such joint resolution shall be considered in the Senate in accordance with the provisions of section 601(b) of Public Law 94-329.

(4) The subsidiary agreements or portions thereof referred to in paragraph (2) are as follows:

(A) Articles III and IV of the agreement referred to in section 462(b) of the Compact.

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(B) Articles III, IV, V, VI, VII, VIII, IX, X, and XI (except for Section 7 thereof) of the agreement referred to in section 462(e) of the Compact.

(C) Articles IV, V, X, XIV, XVI, and XVIII of the agreement referred to in section 462(i) of the Compact.

(D) Articles II, V, VI, VII, and VIII of the agreement referred to in section 462(g) of the Compact.

(E) Articles II, V, VI, and VIII of the agreement referred to in section 462(h) of the Compact.

(F) The Agreement set forth on pages 388 through 391 of House Document 98-192 of March 30, 1984.

(5) No agreement between the United States and the Government of either the Federated States of Micronesia or the Marshall Islands which would amend, change, or terminate any subsidiary agreement or portion thereof, other than those set forth in subsection (d) of this section or paragraph (4) of this subsection shall take effect until the President has transmitted such agreement to the President of the Senate and the Speaker of the House of Representatives together with an explanation of the agreement and the reasons therefore.

SEC. 102. AGREEMENTS WITH FEDERATED STATES OF MICRONESIA.

(a) LAW ENFORCEMENT ASSISTANCE.—

(1) AGREEMENT.—The President of the United States shall negotiate with the Government of the Federated States of Micronesia an agreement pursuant to section 175 of the Compact which is in addition to the Agreement pursuant to such section dated October 1, 1982, and transmitted to the Congress by the President on February 20, 1985. Such additional agreement shall provide as follows:

(A) MUTUAL ASSISTANCE IN LAW ENFORCEMENT.—The law enforcement agencies of the United States and the Federated States

of Micronesia shall assist one another, as mutually agreed, in the prevention and investigation of crimes and the enforcement of the laws of the United States and the Federated States of Micronesia specified in subparagraph (C) of this paragraph. The United States and the Federated States of Micronesia will authorize mutual assistance with respect to investigations, inquiries, audits and related activities by the law enforcement agencies of both Governments in the United States and the Federated States of Micronesia. In conducting activities authorized in accordance with this section, the United Stat[e]s and the Federated States of Micronesia will act in accordance with the constitution and laws of the jurisdiction in which such activities are conducted.

(B) NARCOTICS AND CONTROL OF ILLEGAL SUBSTANCES.—The United States and the Federated States of Micronesia will take all reasonable and necessary steps, as mutually agreed, based upon consultations in which the Attorney General or other designated official of each Government participates, to prevent the use of the lands, waters, and facilities of the United States or the Federated States of Micronesia for the purposes of cultivation of, production of, smuggling of, trafficking in, and abuse of any controlled substance as defined in section 102(6) of the United States Controlled Substances Act and Sch[e]dules I through V of Subchapter II of the Controlled Substances Act of the Fed-[1776]erated States of Micronesia, or for the distribution of any such substance to or from the Federated States of Micronesia or

to or from the United States or any of its territories or commonwealths.

(C) OTHER CRIMINAL LAWS.—Assistance provided pursuant to this subsection shall also extend to, but not be limited to, prevention and prosecution of violations of the laws of the United States and the laws of the Federated States of Micronesia related to terrorism, espionage, racketeer influenced and corrupt organizations, and financial transactions which advance the interests of any person engaging in unlawful activities, as well as the schedule of offenses set forth in Appendix A of the subsidiary agreement to section 175 of the Compact.

(2) TECHNICAL AND TRAINING ASSISTANCE.—Pursuant to sections 224 and 226 of the Compact, the United States shall provide non-reimbursable technical and training assistance as appropriate, including training and equipment for postal inspection of illicit drugs and other contraband, to enable the Government of the Federated States of Micronesia to develop and adequately enforce laws of the Federated States of Micronesia and to cooperate with the United States in the enforcement of criminal laws of the United States. Funds appropriated pursuant to section 105(l) of this title may be used to reimburse State or local agencies providing such assistance.

(3) CONSULTATION.—Any official, designated by this joint resolution or by the President to negotiate any agreement under this section, shall consult with affected law enforcement agencies prior to entering into such an agreement on behalf of the United States.

(4) REPORT.—The President shall report annually to Congress on the implementation of this subsection. Such rep[o]rt shall provide statistical and other information about the incidence of crimes in the Federated States of Micronesia which have an impact upon United States jurisdictions, and propose measures which the United States and the Federated States of Micronesia should take in order better to prevent and prosecute violations of the laws of the United States and the Federated States of Micronesia. The reports required under section 481(e) of the Foreign Assistance Act of 1961 shall include relevant information concerning the Federated States of Micronesia.

(b) ECONOMIC DEVELOPMENT PLANS REVIEW PROCESS.—

(1) SUBMISSION.—Notwithstanding section 211(b) of the Compact, the President may agree to an effective date for the Compact pursuant to section 101(a) of this title if the Government of the Federated States of Micronesia agrees to submit economic development plans consistent with section 211(b) of the Compact to the Government of the United States for concurrence at intervals no greater than every 5 years for the duration of the Compact. Any capital construction project and any planned independent purchase of aircraft which is to be financed (directly or indirectly) through the use of funds provided under section 211 of the Compact shall be identified in the economic development plans.

(2) UNITED STATES GOVERNMENT REVIEW.—The United States shall not concur in those devel-

opment plans described in paragraph (1) of this subsection until—

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(A) after the President of the United States has conducted a review and reported the findings of the President to the Congress; and

(B) the Congress has had 30 days (excluding days on which both Houses of Congress are not in session) to review the findings of the President.

(3) REPORT.—The President shall complete the review under paragraph (2) and shall report the findings no later than 60 days after the President's receipt of such plans.

(4) VIEWS AND COMMENTS.—The report shall include the views of the Secretary of the Interior, the Administrator of the Agency for International Development, and the heads of such other Executive departments as the President may decide to include in the report, as well as any comments which the Federated States of Micronesia may wish to have included.

(c) AGREEMENT ON AUDITS.—In accordance with section 233 of the Compact, the President of the United States, in consultation with the Comptroller General of the United States, shall negotiate with the Government of the Federated States of Micronesia modifications to the "Agreement Concerning Procedures for the Implementation of United States Economic Assistance, Programs and Services Provided in the Compact of Free Association", which shall provide as follows:

(1) GENERAL AUTHORITY OF THE GAO TO AUDIT.—

(A) The Comptroller General of the United States (and his duly authorized representatives) shall have the authority to audit—

(i) all grants, program assistance, and other assistance provided t[o] the Government of the Federated States of Micronesia under Articles I and II of Title Two of the Compact; and

(ii) any other assistance provided by the Government of the United States to the Government of the Federated States of Micronesia.

Such authority shall include authority for the Comptroller General to conduct or cause to be conducted any of the audits provided for in section 233 of the Compact. The authority provided in this paragraph shall continue for at least three years after the last such grant has been made or assistance has been provided.

(B) The Comptroller General (and his duly authorized representatives) shall also have authority to review any audit conducted by or on behalf of the Government of the United States. In this connection, the Comptroller General shall have access to such personnel and to such records, documents, working papers, automated data and files, and other information relevant to such review.

(2) GAO ACCESS TO RECORDS.—

(A) In carrying out paragraph (1), the Comptroller General (and his duly authorized representatives) shall have such access to the personnel and (without cost) to records, docu-

ments, working papers, automated data and files, and other information relevant to such audits. The Comptroller General may duplicate any such records, documents, working papers, automated data and files, or other information relevant to such audits.

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(B) Such records, documents, working papers, automated data and files, and other information regarding each such grant or other assistance shall be maintained for at least three years after the date such grant or assistance was provided and in a manner that permits such grants, assistance, and payments to be accounted for distinct from any other funds of the Government of the Federated States of Micronesia.

(3) REPRESENTATIVE STATUS FOR GAO REPRESENTATIVES.—The Comptroller General and his duly authorized representatives shall be accorded the status set forth in Article V of Title One of the Compact.

(4) ANNUAL FINANCIAL STATEMENTS.—As part of the annual report submitted by the Government of the Federated States of Micronesia under section 211 of the Compact, the Government shall include annual financial statements which account for the use of all of the funds provided by the Government of the United States to the Government under the Compact or otherwise. Such financial statements shall be prepared in accordance with generally accepted accounting procedures, except as may otherwise be mutually agreed. Not later than 180 days after the end of the United States

fiscal year with respect to which such funds were provided, each such statement shall be submitted to the President for audit and transmission to the Congress.

(5) DEFINITION OF AUDITS.—As used in this subsection, the term "audits" includes financial, program, and management audits, including determining—

(A) whether the Government of the Federated States of Micronesia has met the requirements set forth in the Compact, or any related agreement entered into under the Compact, regarding the purposes for which such grants and other assistance are to be used; and

(B) the propriety of the financial transactions of the Government of the Federated States of Micronesia pursuant to such grants or assistance.

(6) COOPERATION BY FEDERATED STATES OF MICRONESIA.—The Government of the Federated States of Micronesia will cooperate fully with the Comptroller General of the United States in the conduct of such audits as the Comptroller General determines necessary to enable the Comptroller General to fully discharge his responsibilities under this joint resolution.

SEC. 103. AGREEMENTS WITH AND OTHER PROVISIONS RELATED TO THE MARSHALL ISLANDS.

(a) LAW ENFORCEMENT ASSISTANCE.—

(1) AGREEMENT.—The President of the United States shall negotiate with the Government of the Marshall Islands an agreement pursuant to section 175 of the Compact which is in addition to the

Agreement pursuant to such section dated May 30, 1982, and transmitted to the Congress by the President on February 20, 1985. Such additional agreement shall provide as follows:

(A) MUTUAL ASSISTANCE IN LAW ENFORCEMENT.—The law enforcement agencies of the United States and the Marshall Islands shall assist one another, as mutually agreed, in the prevention and investigation of crimes and the enforcement of the laws of the United States and the [1779] Marshall Islands specified in subparagraph (C) of this paragraph. The United States and the Marshall Islands will authorize mutual assistance with respect to investigations, inquiries, audits and related activities by the law enforcement agencies of both Governments in the United States and the Marshall Islands. In conducting activities authorized in accordance with this section, the United States and the Marshall Islands will act in accordance with the constitution and laws of the jurisdiction in which such activities are conducted.

(B) NARCOTICS AND CONTROL OF ILLEGAL SUBSTANCES.—The United States and the Marshall Islands will take all reasonable and necessary steps, as mutually agreed, based upon consultations in which the Attorney General or other designated official of each Government participates, to prevent the use of the lands, waters, and facilities of the United States or the Marshall Islands for the purposes of cultivation of, production of, smuggling of, trafficking in, and abuse of any controlled substance as defined in section 102(6) of the United

States Controlled Substances Act and Schedules I through V of Subchapter II of the Controlled Substances Act of the Marshall Islands, or for the distribution of any such substance to or from the Marshall Islands or to or from the United States or any of its territories or commonwealths.

(C) OTHER CRIMINAL LAWS.—Assistance provided pursuant to this subsection shall also extend to, but not be limited to, prevention and prosecution of violations of the laws of the United States and the laws of the Marshall Islands related to terrorism, espionage, racketeer influenced and corrupt organizations, and financial transactions which advance the interests of any person engaging in unlawful activities, as well as the schedule of offenses set forth in Appendix A of the subsidiary agreement to section 175 of the Compact.

(2) TECHNICAL AND TRAINING ASSISTANCE.—Pursuant to sections 224 and 226 of the Compact, the United States shall provide non-reimbursable technical and training assistance as appropriate, including training and equipment for postal inspection of illicit drugs and other contraband, to enable the Government of the Marshall Islands to develop and adequately enforce laws of the Marshall Islands and to cooperate with the United States in the enforcement of criminal laws of the United States. Funds appropriated pursuant to section 105(l) of this title may be used to reimburse State or local agencies providing such assistance.

(3) CONSULTATION.—Any official, designated by this joint resolution or by the President to nego-

tiate any agreement under this section, shall consult with affected law enforcement agencies prior to entering into such an agreement on behalf of the United States.

(4) REPORT.—The President shall report annually to Congress on the implementation of this subsection. Such report shall provide statistical and other information about the incidence of crimes in the Marshall Islands which have an impact upon United States jurisdictions, and propose measures which the United States and the Marshall Islands should take in order better to prevent and prosecute violations of the laws of the [1780] United States and the Marshall Islands. The reports required under section 481(e) of the Foreign Assistance Act of 1961 shall include relevant information concerning the Marshall Islands.

(b) ECONOMIC DEVELOPMENT PLANS REVIEW PROCESS.—

(1) SUBMISSION.—Notwithstanding section 211(b) of the Compact, the President may agree to an effective date for the Compact pursuant to section 101(b) of this title if the Government of the Marshall Islands agrees to submit economic development plans consistent with section 211(b) of the Compact to the Government of the United States for concurrence at intervals no greater than every 5 years for the duration of the Compact. Any capital construction project and any planned independent purchase of aircraft which is to be financed (directly or indirectly) through the use of funds provided under section 211 of the Compact shall be identified in the economic development plans.

(2) UNITED STATES GOVERNMENT REVIEW.—The United States shall not concur in those development plans described in paragraph (1) of this subsection until—

(A) after the President of the United States has conducted a review and reported the findings of the President to the Congress; and

(B) the Congress has had 30 days (excluding days on which both Houses of Congress are not in session) to review the findings of the President.

(3) REPORT.—The President shall complete the review under paragraph (2) and shall report the findings no later than 60 days after the President's receipt of such plans.

(4) VIEWS AND COMMENTS.—The report shall include the views of the Secretary of the Interior, the Administrator of the Agency for International Development, and the heads of such other Executive departments as the President may decide to include in the report, as well as any comments which the Marshall Islands may wish to have included.

(c) EJIT.—(1) The President of the United States shall negotiate with the Government of the Marshall Islands an agreement whereby, without prejudice as to any claims which have been or may be asserted by any party as to rightful title and ownership of any lands on Ejit, the Government of the Marshall Islands shall assure that lands on Ejit used as of January 1, 1985, by the people of Bikini, will continue to be available without charge for their use, until such time as Bikini is restored and inhabitable and the continued use of Ejit is

no longer necessary, unless a Marshall Islands court of competent jurisdiction finally determines that there are legal impediments to continued use of Ejit by the people of Bikini.

(2) If the impediments described in paragraph (1) do arise, the United Stat[e]s will cooperate with the Government of the Marshall Islands in assisting any person adversely affected by such judicial determination to remain on Ejit, or in locating suitable and acceptable alternative lands for such person's use.

(3) Paragraph (1) shall not be applied in a manner which would prevent the Government of the Marshall Islands from acting in accordance with its constitutional processes to resolve title and ownership claims with respect to such lands or from taking substitute or additional measures to meet the needs of the people of Bikini with their democratically expressed consent and approval.

(d) KWAJALEIN PAYMENTS.—

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(1) STATEMENT OF POLICY.—The Congress of the United States hereby declares that it is the policy of the United States that payment of funds by the Government of the Marshall Islands to the landowners of Kwajalein Atoll in accordance with the land use agreement dated October 19, 1982, and the related allocation agreements, is required in order to ensure that the Government of the United States will be able to fulfill its obligations and responsibilities under Title Three of the Compact and the subsidiary agreements concluded pursuant thereto.

(2) FAILURE TO PAY.—In the event that the Government of the Marshall Islands fails to make payments in accordance with paragraph (1) of this subsection, the Government of the United States shall initiate procedures under Section 313 of the Compact and consult with the Government of the Marshall Islands with respect to the basis for such non-payment of funds. The United States shall expeditiously resolve the matter of any non-payment of funds as described in paragraph (1) of this subsection pursuant to Section 313 of the Compact and the authority and responsibility of the Government of the United States for security and defense matters in or relating to the Marshall Islands. This paragraph shall be enforced, as may be necessary, in accordance with section 105(g)(2) of this joint resolution.

(3) ASSISTANCE.—The President is hereby authorized to make loans and grants to the Government of the Marshall Islands for the sole use of the Kwajalein Atoll Development Authority for the benefit of the Kwajalein landowners of amounts sought by such authority for development purposes, pursuant to a development plan for Kwajalein Atoll which such authority has adopted in accordance with applicable laws of the Marshall Islands. Such loans and grants shall be subject to such other terms and conditions as the President, in his discretion, may determine appropriate and necessary.

(e) SECTION 177 AGREEMENT.—(1) In furtherance of the purposes of Article I of the Subsidiary Agreement for Implementation of Section 177 of the Compact, the payment of the amount specified therein shall be made by the United States under Article I of the

Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact (hereafter in this subsection referred to as the "Section 177 Agreement") only after the Government of the Marshall Islands has notified the President of the United States as to which investment management firm has been selected by such Government to act as Fund Manager under Article I of the Section 177 Agreement.

(2) In the event that the President determines that an investment management firm selected by the Government of the Marshall Islands does not meet the requirements specified in Article I of the Section 177 Agreement, the United States shall invoke the conference and dispute resolution procedures of Article II of Title Four of the Compact. Pending the resolution of such a dispute and until a qualified Fund Manager has been designated, the Government of the Marshall Islands shall place the funds paid by the United States pursuant to Article I of the Section 177 Agreement into an interest-bearing escrow account. Upon designation of a qualified Fund Manager, all funds in the escrow account shall be transferred to the control of such Fund Manager for management pursuant to the Section 177 Agreement.

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(3) If the Government of the Marshall Islands determines that some other investment firm should act as Fund Manager in place of the firm first (or subsequently) selected by such Government, the Government of the Marshall Islands shall so notify the President of the United States, identifying the firm selected by such Government to become Fund Manager, and the

President shall proceed to evaluate the qualifications of such identified firm.

(4) At the end of 15 years after the effective date of the Compact, the firm then acting as Fund Manager shall transfer to the Government of the Marshall Islands, or to such account as such Government shall so notify the Fund Manager, all remaining funds and assets being managed by the Fund Manager under the Section 177 Agreement.

(5) An annual report concerning all actions of the Fund Manager pursuant to the Section 177 Agreement and this joint resolution, including information prepared by the Fund Manager, shall be transmitted by the Government of the Marshall Islands to the Congress. Such report shall include such information (whether received from the Fund Manager or any other source) as relates to the disbursements provided for in Article II of the Section 177 Agreement. Such report shall be made public.

(f) NUCLEAR TEST EFFECTS.—In approving the Compact, the Congress understands and intends that the peoples of Bikini, Enewetak, Rongelap, and Utrik, who were affected by the United States nuclear weapons testing program in the Marshall Islands, will receive the amounts of $75,000,000 (Bikini); $48,750,000 (Enewetak); $37,500,000 (Rongelap); and $22,500,000 (Utrik), respectively, which amounts shall be paid out of proceeds from the fund established under Article I, section 1 of the subsidiary agreement for the implementation of section 177 of the Compact. The amounts specified in this subsection shall be in addition to any amounts which may be awarded to claimants pursuant to Article IV of the subsidiary agreement for the implementation of Section 177 of the Compact.

(g) ESPOUSAL PROVISIONS.—(1) It is the intention of the Congress of the United States that the provisions of section 177 of the Compact of Free Association and the Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact (hereafter in this subsection referred to as the "Section 177 Agreement") constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement.

(2) In furtherance of the intention of Congress as stated in paragraph (1) of this subsection, the Section 177 Agreement is hereby ratified and approved. It is the explicit understanding and intent of Congress that the jurisdictional limitations set forth in Article XII of such Agreement are enacted solely and exclusively to accomplish the objective of Article X of such Agreement and only as a clarification of the effect of Article X, and are not to be construed or implemented separately from Article X.

(h) DOE RADIOLOGICAL HEALTH CARE PROGRAM; USDA AGRICULTURAL AND FOOD PROGRAMS.—

(1) MARSHALL ISLANDS PROGRAM.—Notwithstanding any other provision of law, upon the request of the Government of the Marshall Islands, the President (either through an appropriate [1783] department or agency of the United States or by contract with a United States firm) shall continue to provide special medical care and logistical support thereto for the remaining 174 members of the population of Rongelap and Utrik who were exposed to radiation resulting from the 1954

United States thermonuclear "Bravo" test, pursuant to Public Laws 95-134 and 96-205. Such medical care and its accompanying logistical support shall total $22,500,000 over the first 11 years of the Compact.

(2) AGRICULTURAL AND FOOD PROGRAMS.—Notwithstanding any other provision of law, upon the request of the Government of the Marshall Islands, for the first five years after the effective date of the Compact, the President (either through an appropriate department or agency of the United States or by contract with a United States firm) shall provide technical and other assistance—

(A) without reimbursement, to continue the planting and agricultural maintenance program on Enewetak;

(B) without reimbursement, to continue the food programs of the Bikini and Enewetak people described in section 1(d) of Article II of the Subsidiary Agreement for the Implementation of Section 177 of the Compact and for continued waterborne transportation of agricultural products to Enewetak including operations and maintenance of the vessel used for such purposes.

(3) PAYMENTS.—Payments under this subsection shall be provided to such extent or in such amounts as are necessary for services and other assistance provided pursuant to this subsection. It is the sense of Congress that after the periods of time specified in paragraphs (1) and (2) of this subsection, consideration will be given to such additional funding for these programs as may be necessary.

(i) RONGELAP.—(1) Because Rongelap was directly affected by fallout from a 1954 United States thermonuclear test and because the Rongelap people remain unconvinced that it is safe to continue to live on Rongelap Island, it is the intent of Congress to take such steps (if any) as may be necessary to overcome the effects of such fallout on the habitability of Rongelap Island, and to restore Rongelap Island, if necessary, so that it can be safely inhabited. Accordingly, it is the expectation of the Congress that the Government of the Marshall Islands shall use such portion of the funds specified in Article II, section 1(e) of the subsidiary agreement for the implementation of section 177 of the Compact as are necessary for the purpose of contracting with a qualified scientist or group of scientists to review the data collected by the Department of Energy relating to radiation levels and other conditions on Rongelap Island resulting from the thermonuclear test. It is the expectation of the Congress that the Government of the Marshall Islands, after consultation with the people of Rongelap, shall select the party to review such data, and shall contract for such review and for submission of a report to the President of the United States and the Congress as to the results thereof.

(2) The purpose of the review referred to in paragraph (1) of this subsection shall be to establish whether the data cited in support of the conclusions as to the habitability of Rongelap Island, as set forth in the Department of Energy report entitled: "The Meaning of Radiation for Those Atolls in the Northern Part of the Marshall Islands That Were Surveyed in 1978", dated November 1982, are [1784] adequate and whether such conclusions are fully supported by the data. If the party reviewing the data concludes that such conclusions as to habitability are fully supported

by adequate data, the report to the President of the United States and the Congress shall so state. If the party reviewing the data concludes that the data are inadequate to support such conclusions as to habitability or that such conclusions as to habitability are not fully supported by the data, the Government of the Marshall Islands shall contract with an appropriate scientist or group of scientists to undertake a complete survey of radiation and other effects of the nuclear testing program relating to the habitability of Rongelap Island. Such sums as are necessary for such survey and report concerning the results thereof and as to steps needed to restore the habitability of Rongelap Island are authorized to be made available to the Government of the Marshall Islands.

(3) It is the intent of Congress that such steps (if any) as are necessary to restore the habitability of Rongelap Island and return the Rongelap people to their homeland will be taken by the United States in consultation with the Government of the Marshall Islands and, in accordance with its authority under the Constitution of the Marshall Islands, the Rongelap local government council.

(j) FOUR ATOLL HEALTH CARE PROGRAM.—(1) Services provided by the United States Public Health Service or any other United States agency pursuant to section 1(a) of Article II of the Agreement for the Implementation of Section 177 of the Compact (hereafter in this subsection referred to as the "Section 177 Agreement") shall be only for services to the people of the Atolls of Bikini, Enewetak, Rongelap, and Utrik who were affected by the consequences of the United States nuclear testing program, pursuant to the program described in Public Law 95-134 and Public Law 96-205 and their descendants (and any other persons

identified as having been so affected if such identification occurs in the manner described in such public laws). Nothing in this subsection shall be construed as prejudicial to the views or policies of the Government of the Marshall Islands as to the persons affected by the consequences of the United States nuclear testing program.

(2) At the end of the first year after the effective date of the Compact and at the end of each year thereafter, the providing agency or agencies shall return to the Government of the Marshall Islands any unexpended funds to be returned to the Fund Manager (as described in Article I of the Section 177 Agreement) to be covered into the Fund to be available for future use.

(3) The Fund Manager shall retain the funds returned by the Government of the Marshall Islands pursuant to paragraph (2) of this subsection, shall invest and manage such funds, and at the end of 15 years after the effective date of the Compact, shall make from the total amount so retained and the proceeds thereof annual disbursements sufficient to continue to make payments for the provision of health services as sp[e]cified in paragraph (1) of this subsection to such extent as may be provided in contracts between the Government of the Marshall Islands and appropriate United States providers of such health services.

(k) ENJEBI COMMUNITY TRUST FUND.—Notwithstanding any other provision of law, the Secretary of the Treasury shall establish on the books of the Treasury of the United States a fund having the status specified in Article V of the subsidiary agreement for the implementation of Section 177 of the Compact, to be known as the [1785] "Enjebi Community Trust Fund" (hereafter in this subsection referred to as the "Fund"),

and shall credit to the Fund the amount of $7,500,000. Such amount, which shall be ex gratia, shall be in addition to and not charged against any other funds provided for in the Compact and its subsidiary agreements, this joint resolution, or any other Act. Upon receipt by the President of the United States of the agreement described in this subsection, the Secretary of the Treasury, upon request of the Government of the Marshall Islands, shall transfer the Fund to the Government of the Marshall Islands, provided that the Government of the Marshall Islands agrees as follows:

(1) ENJEBI TRUST AGREEMENT.—The Government of the Marshall Islands and the Enewetak Local Government Council, in consultation with the people of Enjebi, shall provide for the creation of the Enjebi Community Trust Fund and the employment of the manager of the Enewetak Fund established pursuant to the Section 177 Agreement as trustee and manager of the Enjebi Community Trust Fund, or, should the manager of the Enewetak Fund not be acceptable to the people of Enjebi, another United States investment manager with substantial experience in the administration of trusts and with funds under management in excess of 250 million dollars.

(2) MONITOR CONDITIONS.—Upon the request of the Government of the Marshall Islands, the United States shall monitor the radiation and other conditions on Enjebi and within one year of receiving such a request shall report to the Government of the Marshall Islands when the people of Enjebi may resettle Enjebi under circumstances where the radioactive contamination at Enjebi, including contamination derived from consumption of locally grown food products, can be reduced or otherwise

controlled to meet whole body Federal radiation protection standards for the general population, including mean annual dose and mean 30-year cumulative dose standards.

(3) RESETTLEMENT OF ENJEBI.—In the event that the United States determines that the people of Enjebi can within 25 years of the date of the enactment of this joint resolution resettle Enjebi under the conditions set forth in paragraph (2) of this subsection, then upon such determination there shall be available to the people of Enjebi from the Fund such amounts as are necessary for the people of Enjebi to do the following, in accordance with a plan developed by the Enewetak Local Government Council and the people of Enjebi, and concurred with by the Government of the Marshall Islands to assure consistency with the government's overall economic development plan:

(A) Establish a community on Enjebi Island for the use of the people of Enjebi.

(B) Replant Enjebi with appropriate food-bearing and other vegetation.

(4) RESETTLEMENT OF OTHER LOCATION.—In the event that the United States determines that within 25 years of the date of the enactment of this joint resolution the people of Enjebi cannot resettle Enjebi without exceeding the radiation standards set forth in paragraph (2) of this subsection, then the fund manager shall be directed by the trust instrument to distribute the Fund to the people of Enjebi for their resettlement at some other location in accordance with a plan, developed by the Enewetak Local Government Council and the people of Enjebi and con-[1786]curred with by the

Government of the Marshall Islands, to assure consistency with the government's overall economic development plan.

(5) INTEREST FROM FUND.—Prior to and during the distribution of the corpus of the Fund pursuant to paragraphs (3) and (4) of this subsection, the people of Enjebi may, if they so request, receive the interest earned by the Fund on no less frequent a basis than quarterly.

(6) DISCLAIMER OF LIABILITY.—Neither under the laws of the Marshall Islands nor under the laws of the United States, shall the Government of the United States be liable for any loss or damage to person or property in respect to the resettlement of Enjebi by the people of Enjebi, pursuant to the provision of this subsection or otherwise.

(l) BIKINI ATOLL CLEANUP.—

(1) DECLARATION OF POLICY.—The Congress hereby determines and declares that it is the policy of the United States, to be supported by the full faith and credit of the United States, that because the United States, through its nuclear testing and other activities, rendered Bikini Atoll unsafe for habitation by the people of Bikini, the United States will fulfill its responsibility for restoring Bikini Atoll to habitability, as set forth in paragraph (2) and (3) of this subsection.

(2) CLEANUP FUNDS.—There are hereby authorized to be appropriated such sums as are necessary to implement the settlement agreement of March 15, 1985, in The People of Bikini, et al. against United States of America, et al., Civ. No. 84-0425 (D. Ha.).

(3) CONDITIONS OF FUNDING.—The funds referred to in paragraph (2) shall be made available pursuant to Article VI, Section 1 of the Compact Section 177 Agreement upon completion of the events set forth in the settlement agreement referred to in paragraph (2) of this subsection.

(m) AGREEMENT ON AUDITS.—In accordance with section 233 of the Compact, the President of the United States, in consultation with the Comptroller General of the United States, shall negotiate with the Government of the Marshall Islands an agreement which shall provide as follows:

(1) GENERAL AUTHORITY OF THE GAO TO AUDIT.—

(A) The Comptroller General of the United States (and his duly authorized representatives) shall have the authority to audit—

(i) all grants, program assistance, and other assistance provided to the Government of the Marshall Islands under Articles I and II of Title Two of the Compact; and

(ii) any other assistance provided by the Government of the United States to the Government of the Marshall Islands.

Such authority shall include authority for the Comptroller General to conduct or cause to be conducted any of the audits provided for in section 233 of the Compact. The authority provided in this paragraph shall continue for at least three years after the last such grant has been made or assistance has been provided.

(B) The Comptroller General (and his duly authorized representatives) shall also have authority to review any [1787] audit conducted by or on behalf of the Government of the United States. In this connection, the Comptroller General shall have access to such personnel and to such records, documents, working papers, automated data and files, and other information relevant to such review.

(2) GAO ACCESS TO RECORDS.—

(A) In carrying out paragraph (1), the Comptroller General (and his duly authorized representatives) shall have such access to the personnel and (without cost) to records, documents, working papers, automated data and files, and other information relevant to such audits. The Comptroller General may duplicate any such records, documents, working papers, automated data and files, or other information relevant to such audits.

(B) Such records, documents, working papers, automated data and files, and other information regarding each such grant or other assistance shall be maintained for at least three years after the date such grant or assistance was provided and in a manner that permits such grants, assistance and payments to be accounted for distinct from any other funds of the Government of the Marshall Islands.

(3) REPRESENTATIVE STATUS FOR GAO REPRESENTATIVES.—The Comptroller General and his duly authorized representatives shall be accorded the status set forth in Article V of Title One of the Compact.

(4) ANNUAL FINANCIAL STATEMENTS.—As part of the annual report submitted by the Government of the Marshall Islands under section 211 of the Compact, the Government shall include annual financial statements which account for the use of all of the funds provided by the Government of the United States to the Government under the Compact or otherwise. Such financial statements shall be prepared in accordance with generally accepted accounting procedures, except as may otherwise be mutually agreed. Not later than 180 days after the end of the United States fiscal year with respect to which such funds were provided, each such statement shall be submitted to the President for audit and transmission to the Congress.

(5) DEFINITION OF AUDITS.—As used in this subsection, the term "audits" includes financial, program, and management audits, including determining—

> (A) whether the Government of the Marshall Islands has met t[h]e requirements set forth in the Compact, or any related agreement entered into under the Compact, regarding the purposes for which such grants and other assistance are to be used; and
>
> (B) the propriety of the financial transactions of the Government of the Marshall Islands pursuant to such grants or assistance.

(6) COOPERATION BY MARSHALL ISLANDS.—The Government of the Marshall Islands will cooperate fully with the Comptroller General of the United States in the conduct of such audits as the Comptroller General determines necessary to en-

able the Comptroller General to fully discharge his responsibilities under this joint resolution.

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SEC. 104. INTERPRETATION OF AND UNITED STATES POLICY REGARDING COMPACT OF FREE ASSOCIATION.

(a) HUMAN RIGHTS.—In approving the Compact, the Congress notes the conclusion in the Statement of Intent of the Report of The Future Political Status Commission of the Congress of Micronesia in July, 1969, that "our recommendation of a free associated state in indissolubly linked to our desire for such a democratic, representative, constitutional government" and notes that such desire and intention are reaffirmed and embodied in the Constitutions of the Federated States of Micronesia and the Marshall Islands. The Congress also notes and specifically endorses the preamble to the Compact, which affirms that the governments of the parties to the Compact are founded upon respect for human rights and fundamental freedoms for all. The Secretary of State shall include in the annual reports on the status of internationally recognized human rights in foreign countries, which are submitted to the Congress pursuant to sections 116 and 502B of the Foreign Assistance Act of 1961, a full and complete report regarding the status of internationally recognized human rights in the Federated States of Micronesia and the Marshall Islands.

(b) IMMIGRATION.—The rights of a bona fide naturalized citizen of the Marshall Islands or the Federated States of Micronesia to enter the United States, to lawfully engage therein in occupations, and to establish residence therein as a non-immigrant, pursuant to the provisions of section 141(a)(3) of the Compact, shall not

extend to any such naturalized citizen with respect to whom circumstances associated with the acquisition of the status of a naturalized citizen are such as to allow a reasonable inference, on the part of appropriate officials of the United States and subject to United States procedural requirements, that such naturalized status was acquired primarily in order to obtain such rights.

(c) NONALIENATION OF LANDS.—The Congress endorses and encourages the maintenance of the policies of the Government of the Federated States of Micronesia and the Government of the Marshall Islands to regulate, in accordance with their Constitutions and laws, the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Federated States of Micronesia citizenship and Marshall Islands citizenship, respectively.

(d) NUCLEAR WASTE DISPOSAL.—In approving the Compact, the Congress understands that the Government of the Federated States of Micronesia and the Government of the Marshall Islands will not permit any other government or any nongovernmental party to conduct, in the Marshall Islands or in the Federated States of Micronesia, any of the activities specified in subsection (a) of section 314 of the Compact.

(e) IMPACT OF COMPACT ON U.S. AREAS.—

(1) STATEMENT OF CONGRESSIONAL INTENT.—In approving the Compact, it is not the intent of the Congress to cause any adverse consequences for the United States territories and commonwealths or the State of Hawaii.

(2) ANNUAL REPORTS AND RECOMMENDATIONS.—One year after the date of enactment of

this joint resolution and at one year intervals thereafter, the President shall report to the Congress with respect to the impact of the Compact on the United States territories and commonwealths and on the State of Hawaii. [1789] Reports submitted pursuant to this paragraph (hereafter in this subsection referred to as "reports") shall identify any adverse consequences resulting from the Compact and shall make recommendations for corrective action to eliminate those consequences. The reports shall pay particular attention to matters relating to trade, taxation, immigration, labor laws, minimum wages, social systems and infrastructure, and environmental regulation. With regard to immigration, the reports shall include statistics concerning the number of persons availing themselves of the rights described in section 141(a) of the Compact during the year covered by each report. With regard to trade, the reports shall include an analysis of the impact on the economy of American Samoa resulting from imports of canned tuna into the United States from the Federated States of Micronesia and the Marshall Islands.

(3) OTHER VIEWS.—In preparing the reports, the President shall request the views of the Government of the State of Hawaii, and the governments of each of the United States territories and commonwealths, the Federated States of Micronesia, the Marshall Islands, and Palau, and shall transmit the full text of any such views to the Congress as part of such reports.

(4) COMMITMENT OF CONGRESS TO REDRESS ADVERSE CONSEQUENCES.—The Congress hereby declares that, if any adverse consequences to United States territories and commonwealths or

the State of Hawaii result from implementation of the Compact of Free Association, the Congress will act sympathetically and expeditiously to redress those adverse consequences.

(5) DEFINITION OF U.S. TERRITORIES AND COMMONWEALTHS.—As used in this subsection, the term "United States territories and commonwealths" means the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(6) IMPACT COSTS.—There are hereby authorized to be appropriated for fiscal years beginning after September 30, 1985, such sums as may be necessary to cover the costs, if any, incurred by the State of Hawaii, the territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands resulting from any increased demands placed on educational and social services by immigrants from the Marshall Islands and the Federated States of Micronesia.

(f) FISHERIES MANAGEMENT.—In clarification of Title One, Article II, section 121(b)(1) of the Compact:

(1) Nothing in the Compact or this joint resolution shall be interpreted as recognition by the United States of any claim by the Federated States of Micronesia or by the Marshall Islands to jurisdiction or authority over highly migratory species of fish during the time such species of fish are found outside the territorial sea of the Federated States of Micronesia or the Marshall Islands.

(2) It is the understanding of Congress that none of the monies made available pursuant to the

Compact or this joint resolution will be used by either the Federated States of Micronesia or the Marshall Islands for enforcement actions against any vessel of the United States on the basis of fishing by any such vessel for highly migratory species of fish outside the territorial sea of the [1790] Federated States of Micronesia or the Marshall Islands, respectively, in the absence of a licensing agreement.

(3) Appropriate United States officials shall apply the policies and provisions of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.) and the Fishermen's Protective Act of 1967 (22 U.S.C. 1971 et seq.) with regard to any action taken by the Federated States of Micronesia or the Marshall Islands affecting any vessel of the United States engaged in fishing for highly migratory species of fish in waters outside the territorial seas of the Federated States of Micronesia or the Marshall Islands, respectively. For the purpose of applying the provisions of section 5 of the Fishermen's Protective Act of 1967 (22 U.S.C. 1975), monies made available to either the Federated States of Micronesia or the Marshall Islands pursuant to the provisions of the Compact or this joint resolution shall be treated as "assistance to the government of such country under the Foreign Assistance Act of 1961". For purposes of this Act only, certification by the President in accordance with such section 5 shall be accompanied by a report to Congress on the basis for such certification, and such certification shall have no effect if by law Congress so directs prior to the expiration of 60 days during which Congress is in continuous session following the date of such certification.

(4) For the purpose of paragraphs (1) and (3) of this subsection—

(A) The term "vessel of the United States" has the same meaning as provided in the first section of the Fishermen's Protective Act of 1967 (22 U.S.C. 1971).

(B) The terms "fishing" and "highly migratory species" have the same meanings as provided in paragraphs (10) and (14), respectively, of section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C 1802(10) and (14)).

(5)(A) It is the policy of the United States of America—

(i) to negotiate and conclude with the governments of the Central, Western, and South Pacific Ocean, including the Federated States of Micronesia and the Marshall Islands, a regional licensing agreement setting forth agreed terms of access for United States tuna vessels fishing in the region; and

(ii) that such an agreement should overcome existing jurisdictional differences and provide for a mutually beneficial relationship between the United States and the Pacific Island States that will promote the development of the tuna and other latent fisheries resources of the Central, Western, and South Pacific Ocean and the economic development of the region.

(B) At such time as an agreement referred to in subparagraph (A) is submitted to the Senate for advice and consent to ratification, the Secretary of

State, after consultation with the Secretary of Commerce and other interested agencies and concerned governments, shall submit to the Congress a proposed long term regional fisheries development program which may include, but not be limited to—

(i) exploration for, and stock assessment of, tuna and other fish;

(ii) improvement of harvesting techniques;

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(iii) gear development;

(iv) biological resource monitoring;

(v) education and training in the field of fisheries; and

(vi) regional and direct bilateral assistance in the field of fisheries.

(g) FOREIGN LOANS.—The Congress hereby reaffirms the United States position that the United States Government is not responsible for foreign loans or debt obtained by the Governments of the Federated States of Micronesia and the Marshall Islands.

SEC. 105. SUPPLEMENTAL PROVISIONS.

(a) DOMESTIC PROGRAM REQUIREMENTS.—Except as may otherwise be provided in this joint resolution, all United States Federal programs and services extended to or operated in the Federated States of Micronesia or the Marshall Islands are and shall remain subject to all applicable criteria, standards, reporting requirements, auditing procedures, and other rules and regulations applicable to such programs when operat-

ing in the United States (including its territories and commonwealths).

(b) RELATIONS WITH THE FEDERATED STATES OF MICRONESIA AND THE MARSHALL ISLANDS.—

(1) The United States representatives to the Federated States of Micronesia and the Republic of the Marshall Islands pursuant to Article V of title I of the Compact shall be appointed by the President with the advice and consent of the Senate, and shall be under the supervision of the Secretary of State, who shall have responsibility for government to government relations between the United States and the Government with respect to whom they are appointed, consistent with the authority of the Secretary of the Interior as set forth in this section.

(2) Appropriations made pursuant to the Compact or any other provision of this joint resolution may be made only to the Secretary of the Interior, who shall coordinate and monitor any program or activity provided to the Federated States of Micronesia or the Republic of the Marshall Islands by departments and agencies of the Government of the United States and related economic development planning pursuant to the Compact or pursuant to any other authorization except for the provisions of sections 161(e), 313, and 351 of the Compact and the authorization of the President to agree to an effective date pursuant to this resolution. Funds appropriated to the Secretary of the Interior pursuant to this paragraph shall not be allocated to other Departments or agencies.

(3) All programs and services provided to the Federated States of Micronesia and the Republic of the Marshall Islands by Federal agencies may be

provided only after consultation with and under the supervision of the Secretary of the Interior, and the head of such Federal agency is directed to cooperate with the Secretary of the Interior and to make such personnel and services available as the Secretary of the Interior may request.

(4) Any United States Government personnel assigned, on a temporary or permanent basis, to either the Federated States of Micronesia or the Marshall Islands shall, during the period of such assignment, be subject to the supervision of the United States representative to that area.

(5) The President is hereby authorized to appoint an Interagency Group on Freely Associated States' Affairs to provide [1792] policy guidance to federal departments and agencies. Such interagency group shall include the Secretary of the Interior and the Secretary of State.

(c) CONTINUING TRUST TERRITORY AUTHORIZATION.—The authorization provided by the Act of June 30, 1954, as amended (68 Stat. 330) shall remain available after the effective date of the Com-pact with respect to the Federated States of Micronesia and the Marshall Islands for the following purposes:

(1) Prior to October 1, 1986, for any purpose authorized by the Compact or this joint resolution.

(2) Transition purposes, including but not limited to, completion of projects and fulfillment of commitments or obligations; termination of the Trust Territory Government and termination of the High Court; health and education as a result of exceptional circumstances; ex gratia contributions for the populations of Bikini, Enewetak, Rongelap, and

Utrik; and technical assistance and training in financial management, program administration, and maintenance of infrastructure.

(d) MEDICAL REFERRAL DEBTS.—

(1) FEDERATED STATES OF MICRONESIA.—In addition to the funds provided in Title Two, Article II, section 221(b) of the Compact, following approval of the Compact with respect to the Federated States of Micronesia, the United States shall make available to the Government of the Federated States of Micronesia such sums as may be necessary for the payment of the obligations incurred for the use of medical facilities in the United States, including any territories and commonwealths, by citizens of the Federated States of Micronesia before September 1, 1985.

(2) MARSHALL ISLANDS.—In addition to the funds provided in Title Two, Article II, section 221(b) of the Compact, following approval of the Compact with respect to the Marshall Islands, the United States shall make available to the Government of the Marshall Islands such sums as may be necessary for the payment of the obligations incurred for the use of medical facilities in the United States, its territories and commonwealths by citizens of the Marshall Islands before September 1, 1985.

(3) USE OF FUNDS.—In making funds available pursuant to this subsection, the President shall take such actions as he deems necessary to assure that the funds are used only for the payment of the medical expenses described in paragraph (1) or (2) of this subsection, as the case may be.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are hereby authorized to be appropriated such sums as may be necessary for the purposes of this subsection.

(e) SURVIVABILITY.—In furtherance of the provisions of Title Four, Article V, sections 452 and 453 of the Compact, any provisions of the Compact which remain effective after the termination of the Compact by the act of any party thereto and which are affected in any manner by provisions of this title shall remain subject to such provisions.

(f) REGISTRATION FOR AGENTS OF MICRONESIAN GOVERNMENTS.—

(1) IN GENERAL.—Notwithstanding the provisions of Title One, Article V, section 153 of the Compact, after approval of the Compact any citizen of the United States who, without authority of the United States, acts as the agent of the Government of [1793] the Marshall Islands or the Federated States of Micronesia with regard to matters specified in the provisions of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611 et seq.) that apply with respect to an agent of a foreign principal shall be subject to the requirements of such Act. Failure to comply with such requirements shall subject such citizen to the same penalties and provisions of law as apply in the case of the failure of such an agent of a foreign principal to comply with such requirements. For purposes of the Foreign Agents Registration Act of 1938, the Federated States of Micronesia and the Marshall Islands shall be considered to be foreign countries.

(2) EXCEPTION.—Paragraph (1) of this subsection shall not apply to a citizen of the United States

employed by either the Government of the Marshall Islands or the Government of the Federated States of Micronesia with respect to whom the employing Government from time to time certifies to the Government of the United States that such citizen is an employee of the Government of the Marshall Islands or the Government of the Federated States of Micronesia (as the case may be) whose principal duties are other than those matters specified in the Foreign Agents Registration Act of 1938, as amended, that apply with respect to an agent of a foreign principal. The agency or officer of the United States receiving such certifications shall cause them to be filed with the Attorney G[e]neral, who shall maintain a publicly available list of the persons so certified.

(3) RESIDENT REPRESENTATIVE EXEMPTION.—Nothing in this subsection shall be construed as amending Section 152(b) of the Compact.

(g) NONCOMPLIANCE SANCTIONS.—

(1) AUTHORITY OF PRESIDENT.—The President of the United States shall have no authority to suspend or withhold payments or assistance with respect to—

(A) section 177, 213, 216(a)(2), 216(a)(3), 221(b), or 223 of the Compact, or

(B) any agreements made pursuant to such sections of the Compact,

unless such suspension or withholding is imposed as a sanction due to noncompliance by the Government of the Federated States of Micronesia or the Government of the Marshall Islands (as the case

may be) with the obligations and requirements of such sections of the Compact or such agreements.

(2) ACTIONS INCOMPATIBLE WITH UNITED STATES AUTHORITY.—The Congress expresses its understanding that the Governments of the Federated States of Micronesia and the Marshall Islands will not act in a manner incompatible with the authority and responsibility of the United States for security and defense matters in or related to the Federated States of Micronesia or the Marshall Islands pursuant to the Compact, including the agreements referred to in sections 462(j) and 462(k) thereof. The Congress further expresses its intention that any such act on the part of either such Government will be viewed by the United States as a material breach of the Compact. The Government of the United States reserves the right in the event of such a material breach of the Compact by the Government of the Federated States of Micronesia or the Government of the Marshall Islands to take action, including [1794] (but not limited to) the suspension in whole or in part of the obligations of the Government of the United States to that Government.

(h) CONTINUING PROGRAMS AND LAWS.—

(1) FEDERATED STATES OF MICRONESIA AND MARSHALL ISLANDS.—In addition to the programs and services set forth in section 221 of the Compact, and pursuant to section 224 of the Compact, the programs and services of the following agencies shall be made available to the Federated States of Micronesia and to the Marshall Islands.

(A) the Legal Services Corporation;

(B) the Public Health Service; and

(C) the Farmers Home Administration (in the Marshall Islands and each of the four States of the Federated States of Micronesia: *Provided*, that in lieu of continuation of the program in the Federated States of Micronesia, the President may agree to transfer to the Government of the Federated States of Micronesia without cost, the portfolio of the Farmers Home Loan Administration applicable to the Federated States of Micronesia and provide such technical assistance in management of the portfolio as may be requested by the Federated States of Micronesia).

(2) PALAU.—Upon the effective date of the Compact, the laws of the United States generally applicable to the Trust Territory of the Pacific Islands shall continue to apply to the Republic of Palau and the Republic of Palau shall be eligible for such proportion of Federal assistance as it would otherwise have been eligible to receive under such laws prior to the effective date of the Compact, as provided in appropriation Acts or other Acts of Congress.

(3) SECTION 219 DETERMINATION.—The determinations by the Government of the United States under section 219 of the Compact shall be as provided in appropriation Acts.

(4) TORT CLAIMS.—(A) At such time as the Trusteeship Agreement ceases to apply to either the Federated States of Micronesia or the Marshall Islands, the provisions of Section 178 of the Compact regarding settlement and payment of tort claims shall apply to employees of any federal

agency of the Government of the United States which provides any service of carries out any other function pursuant to or in furtherance of any provisions of the Compact or this Act, except for provisions of Title Three of the Compact and of the subsidiary agreements related to such Title, in such area to which such Agreement formerly applied. For purposes of this subparagraph (B), persons providing such service or carrying out such function pursuant to a contract with a federal agency shall be deemed to be an employee of the contracting federal agency.

(B) For purposes of the Federal Tort Claims Act (28 U.S.C. 2671 et seq.), persons providing services to the people of the atolls of Bikini, Enewetak, Rongelap, and Utrik as described in Public Law 95-134 and Public Law 96-205 pursuant to a contract with a Department or agency of the federal government shall be deemed to be an employee of the contracting Department or agency working in the United States. This subparagraph (B) shall expire when the Trusteeship Agreement is terminated with respect to the Marshall Islands.

(i) COLLEGE OF MICRONESIA; EDUCATION PROGRAMS.—

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(1) COLLEGE OF MICRONESIA.—Notwithstanding any other provision of law, all funds which as of the date of the enactment of this joint resolution were appropriated for the use of the College of Micronesia System shall remain available for use by such college until expended. Until otherwise provided by Act of Congress, or until termination of the Compact, such college shall

retain its status as a land-grant institution and its eligibility for all benefits and programs available to such land-grant institutions.

(2) FEDERAL EDUCATION PROGRAMS.—Pursuant to section 224 of the Compact and upon the request of the affected Government, any Federal program providing financial assistance for education which, as of January 1, 1985, was providing financial assistance for education to the Federated States of Micronesia or the Marshall Islands or to any institution, agency, organization, or permanent resident thereof, including the College of Micronesia System, shall continue to provide such assistance to such institutions, agencies, organizations, and residents as follows:

(A) For the fiscal year in which the Compact becomes effective, not to exceed $13,000,000;

(B) For the fiscal year beginning after the end of the fiscal year in which the Compact becomes effective, not to exceed $8,700,000; and

(C) For the fiscal year immediately following the fiscal year described in subparagraph (B), not to exceed $4,300,000.

(3) AUTHORIZATION OF APPROPRIATIONS.—There are hereby authorized to be appropriated such sums as are necessary for purposes of this subsection.

(j) TRUST TERRITORY DEBTS TO U.S. FEDERAL AGENCIES.—Neither the Government of the Federated States of Micronesia nor the Government of the Marshall Islands shall be required to pay to any department, agency, independent agency, office, or instru-

mentality of the United States any amounts owed to such department, agency, independent agency, office, or instrumentality by the Government of the Trust Territory of the Pacific Islands as of the effective date of the Compact. There is authorized to be appropriated such sums as may be necessary to carry out the purposes of this subsection.

(k) USE OF DOD MEDICAL FACILITIES.—Following approval of the Compact, the Secretary of Defense shall make available the medical facilities of the Department of Defense for use by citizens of the Federated States of Micronesia and the Marshall Islands who are properly referred to such facilities by government authorities responsible for provision of medical services in the Federated States of Micronesia and the Marshall Islands. The Secretary of Defense is hereby authorized to cooperate with such authorities in order to permit use of such medical facilities for persons properly referred by such authorities. The Secretary of Health and Human Services is hereby authorized and directed to continue to make the services of the National Health Service Corps available to the residents of the Federated States of Micronesia and the Marshall Islands to the same extent and for so long as such services are authorized to be provided to persons residing in any other areas within or outside the United States.

(l) TECHNICAL ASSISTANCE.—Technical assistance may be provided pursuant to section 226 of the Compact by Federal agencies and [1796] institutions of the Government of the United States to the extent such assistance may be provided to States, territories, or units of local government. Such assistance by the Forest Service, the Soil Conservation Service, the Fish and Wildlife Service, the National Marine Fisheries Service, the United States Coast Guard, and the Advisory

Council on Historic Preservation, the Department of the Interior, and other agencies providing assistance under the National Historic Preservation Act (80 Stat. 915; 16 U.S.C. 470-470t), shall be on a nonreimbursable basis. During the period the Compact is in effect, the grant programs under the National Historic Preservation Act shall continue to apply to the Federated States of Micronesia and the Marshall Islands in the same manner and to the same extent as prior to the approval of the Compact. Funds provided pursuant to sections 102(a), 103(a), 103(c), 103(h), 103(i), 103(j), 103(l), 105(c), 105(i), 105(j), 105(k), 105(l), 105(m), 105(n), and 105(o) of this joint resolution shall be in addition to and not charged against any amounts to be paid to either the Federated States of Micronesia or the Marshall Islands pursuant to the Compact or the subsidiary agreements.

(m) PRIOR SERVICE BENEFITS PROGRAM.—Notwithstanding any other provision of law, persons who on January 1, 1985, were eligible to receive payment under the Prior Service Benefits Program established within the Social Security System of the Trust Territory of the Pacific Islands because of their services performed for the United States Navy or the Government of the Trust Territory of the Pacific Islands prior to July 1, 1968, shall continue to receive such payments on and after the effective date of the Compact.

(n) INDEFINITE LAND USE PAYMENTS.—There are authorized to be appropriated such sums as may be necessary to complete repayment by the United States of any debts owed for the use of various lands in the Federated States of Micronesia and the Marshall Islands prior to January 1, 1985.

(o) COMMUNICABLE DISEASE CONTROL PROGRAM.—There are authorized to be appropriated for grants to the Government of the Federated States of Micronesia such sums as may be necessary for purposes of establishing or continuing programs for the control and prevention of communicable diseases, including (but not limited to) cholera and Hansen's Disease. The Secretary of the Interior shall assist the Government of the Federated States of Micronesia in designing and implementing such a program.

(p) TRUST FUNDS.—The responsibilities of the United States with regard to implementation of section 235 of the Compact shall be discharged by the Secretary of the Interior, who shall consult with the Government of the Marshall Islands and the designated beneficiaries of the funds held in trust by the High Commissioner of the Trust Territory of the Pacific Islands.

(q) ANNUAL REPORTS ON DETERMINATIONS UNDER COMPACT SECTION 313.—The President shall report annually to the Congress on determinations made by the United States in the exercise of its authority under section 313 of the Compact. Each such report shall describe the following, on a classified basis if necessary:

(1) The actions that the Government of the Federated States of Micronesia or the Government of the Marshall Islands were required to refrain from pursuant to the determinations of the United States.

(2) The justification for each determination by the United States, and the position of the other Government concerned with respect to such determination.

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(3) The effect of the determination on the authority and responsibility of the other government to conduct foreign affairs in accordance with section 121 of the Compact.

(4) Any domestic effect in the Federated States of Micronesia or the Marshall Islands resulting from the determination, including any restriction on the civil and political rights of the citizens thereof.

(r) USER FEES.—Any person in the Federated States of Micronesia or the Marshall Islands shall be liable for user fees, if any, for services provided in the Federated States of Micronesia or the Marshall Islands by the Government of the United States to the same extent as any person in the United States would be liable for fees, if any, for such services in the United States.

SEC. 106. CONSTRUCTION CONTRACT ASSISTANCE.

(a) ASSISTANCE TO U.S. FIRMS.—In order to assist the Governments of the Federated States of Micronesia and of the Marshall Islands through private sector firms which may be awarded contracts for construction or major repair of capital infrastructure within the Federated States of Micronesia or the Republic of the Marshall Islands, the President shall consult with the Governments of the Federated States of Micronesia and the Marshall Islands with respect to any such contracts, and the President shall enter into agreements with such firms whereby such firms will, consistent with applicable requirements of such Governments—

(1) to the maximum extent possible, employ citizens of the Federated States of Micronesia and the Marshall Islands;

(2) to the extent that necessary skills are not possessed by citizens of the Federated States of Micronesia and the Marshall Islands, provide on the job training, with particular emphasis on the development of skills relating to operation of machinery and routine and preventative maintenance of machinery and other facilities; and

(3) provide specific training or other assistance in order to enable the Government to engage in long-term maintenance of infrastructure.

Assistance by such firms pursuant to this section may not exceed 20 percent of the amount of the contract and shall be made available only to such firms which meet the definition of United States firm under the nationality rule for suppliers of services of the Agency for International Development (hereafter in this section referred to as "United States firms"). There are authorized to be appropriated such sums as may be necessary for the purposes of this subsection.

(b) AUTHORIZATION.—There are authorized to be appropriated such sums as may be necessary to cover any additional costs incurred by the Government of the Federated States of Micronesia or the Republic of the Marshall Islands if such Governments, pursuant to an agreement entered into with the United States, apply a preference on the award of contracts to United States firms, provided that the amount of such preference does not exceed 10 percent of the amount of the lowest qualified bid from a non-United States firm for such contract.

SEC. 107. LIMITATIONS.

(a) PROHIBITION.—The provisions of Chapter 11 of title 18, United States Code, shall apply in full to any

individual who has served as the President's Personal Representative for Micronesian Status [1798] Negotiations or who is or was an officer or employee of the Office for Micronesian Status Negotiations or who is or was assigned or detailed to that Office or who served on the Micronesia Interagency Group, except that for the purposes of this section, clauses (i) and (ii) of section 207(b) of such title shall read as follows: "(i) having been so employed, within three years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within three years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before— "

(b) TERMINATION.—Effective upon the date of the termination of the Trust Territory of the Pacific Islands with respect to Palau, the Office for Micronesian Status Negotiations is abolished and no department, agency, or instrumentality of the United States shall thereafter contribute funds for the support of such Office.

SEC. 108. TRANSITIONAL IMMIGRATION RULES.

(a) CITIZEN OF NORTHERN MARIANA ISLANDS.—Any person who is a citizen of the Northern Mariana Islands, as that term is defined in section 24(b) of the Act of December 8, 1983 (97 Stat. 1465), is considered a citizen of the United States for purposes of entry into,

permanent residence, and employment in the United States and its territories and possessions.

(b) TERMINATION.—The provisions of this section shall cease to be effective when section 301 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States (Public Law 94-241) becomes effective pursuant to section 1003(c) of the Covenant.

SEC. 109. TIMING.

No payment may be made pursuant to the Compact nor under any provision of this joint resolution prior to October 1, 1985.

SEC. 110. IMPLEMENTATION OF AUDIT AGREEMENTS.

(a) TRANSMISSION OF ANNUAL FINANCIAL STATEMENT.—Upon receipt of the annual financial statement described in sections 102(c)(4) and 103(m)(4), the President shall promptly transmit a copy of such statement to the Congress.

(b) ANNUAL AUDITS BY THE PRESIDENT.—(1) The President shall cause an annual audit to be conducted of the annual financial statements described in sections 102(c)(4) and 103(m)(4). Such audit shall be conducted in accordance with the Generally Accepted Government Auditing Standards promulgated by the Comptroller General of the United States. Such audit shall be submitted to the Congress not later than 180 days after the end of the United States fiscal year.

(2) The President shall develop and implement procedures to carry out such audits. Such procedures shall include the matters described in sections 102(c)(2) and 103(m)(2) of this title.

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(c) AUTHORITY OF GAO.—The Comptroller General of the United States shall have the authority to conduct the audits referred to in sections 102(c)(1) and 103(m)(1) of this title.

SEC. 111. COMPENSATORY ADJUSTMENTS.

(a) ADDITIONAL PROGRAMS AND SERVICES.—In addition to the programs and services set forth in Section 221 of the Compact, and pursuant to Section 224 of the Compact, the services and programs of the following U.S. agencies shall be made available to the Federated States of Micronesia and the Marshall Islands: The Federal Deposit Insurance Corporation, Small Business Administration, Economic Development Administration, the Rural Electrification Administration, Job Partnership Training Act, Job Corps, and the programs and services of the Department of Commerce relating to tourism and to marine resource development.

(b)(1) INVESTMENT DEVELOPMENT FUNDS.—In order to further close economic and commercial relations between the United States and the Federated States of Micronesia and the Marshall Islands, and in order to encourage the presence of the United States private sector in such areas, there are hereby created two Investment Development Funds, to be established and administered by the Federated States of Micronesia and the Marshall Islands respectively in consultation with the United States as follows:

(i) For the Investment Development Fund for the Federated States of Micronesia there is hereby authorized to be appropriated for fiscal 1986, $20 million, backed by the full faith and credit of the United States, of which $12 million shall be made

available for obligation for the first full fiscal year after the effective date of the Compact, and of which $8 million shall be made available for obligation for the third full fiscal year after the effective date of the Compact.

(ii) For the Investment Development Fund for the Marshall Islands there is hereby authorized to be appropriated $10 million for fiscal 1986, backed by the full faith and credit of the United States, of which $6 million for the first full fiscal year after the effective date of the Compact, and of which $4 million shall be made available for obligation for the third full fiscal year after the effective date of the Compact.

(2) The amounts specified in subsection (b) of this section shall be in addition to the sums and amounts specified in Articles I and III of Title Two of the Compact, and shall be deemed to be included in the sums and amounts referred to in section 236 of the Compact.

(c) BOARD OF ADVISORS.—To provide policy guidance for the Funds established by subsection (b) of this section, the President is hereby authorized to establish a Board of Advisors, pursuant to appropriate agreements between the United States and the Federated States of Micronesia and the Marshall Islands.

(d) FURTHER AMOUNTS.—The governments of the Federated States of Micronesia and the Marshall Islands may submit to Congress reports concerning the overall financial and economic impacts on such areas resulting from the effect of Title IV of this joint resolution upon Title Two of the Compact. There are hereby authorized to be appropriated for fiscal years beginning after September 30, 1990, such amounts as may be necessary, but not to exceed $40 million for the Federated

States of Micronesia and $20 million for the Marshall Islands, as provided in appropriation acts, to further compensate the governments of such islands (in addition to the compensation pro-[1800]vided in subsections (a) and (b) of this section) for adverse impacts, if any, on the finances and economies of such areas resulting from the effect of Title IV of this joint resolution upon Title Two of the Compact. At the end of the initial fifteen-year term of the Compact, should any portion of the total amount of funds authorized in this subsection not have been appropriated, such amount not yet appropriated may be appropriated, without regard to divisions between amounts authorized in this subsection for the Federated States of Micronesia and for the Marshall Islands, based on either or both such government's showing of such adverse impact, if any, as provided in this subsection.

TITLE II—COMPACT OF FREE ASSOCIATION

SEC. 201. COMPACT OF FREE ASSOCIATION.

The Compact of Free Association is as follows:

COMPACT OF FREE ASSOCIATION

PREAMBLE

THE GOVERNMENT OF THE UNTIED STATES OF AMERICA AND THE GOVERNMENTS OF THE MARSHALL ISLANDS AND THE FEDERATED STATES OF MICRONESIA

Affirming that their Governments and their relationships as Governments are founded upon respect for human rights and fundamental freedoms for all, and that the peoples of the Trust Territory of the Pacific Islands have the right to enjoy self-government; and

Affirming the common interests of the United States of America and the peoples of the Trust Terri-

tory of the Pacific Islands in creating close and mutually beneficial relationships through two free and voluntary associations of their respective Governments; and

Affirming the interest of the Government of the United States in promoting the economic advancement and self-sufficiency of the peoples of the Trust Territory of the Pacific Islands; and

Recognizing that their previous relationship has been based upon the International Trusteeship System of the United Nations Charter, and in particular Article 76 of the Charter; and that pursuant to Article 76 of the Charter, the peoples of the Trust Territory have progressively developed their institutions of self-government, and that in the exercise of their sovereign right to self-determination they have, through their freely-expressed wishes, adopted Constitutions appropriate to their particular circumstances; and

Recognizing their common desire to terminate the Trusteeship and establish two new government-to-government relationships each of which is in accordance with a new political status based on the freely-expressed wishes of peoples of the Trust Territory of the Pacific Islands and appropriate to their particular circumstances; and

Recognizing that the peoples of the Trust Territory of the Pacific Islands have and retain their sovereignty and their sovereign right to self-determination and the inherent right to adopt and amend their own Constitutions and forms of government and that the approval of the entry of their respective Governments into this [1801] Compact of Free Association by the peoples of the Trust Territory of the Pacific Islands constitutes an exercise of their sovereign right to self-determination;

NOW, THEREFORE, AGREE to enter into relationships of free association which provide a full measure of self-government for the peoples of the Marshall Islands and the Federated States of Micronesia; and

FURTHER AGREE that the relationships of free association derive from and are as set forth in this Compact; and that, during such relationships of free association, the respective rights and responsibilities of the Government of the United States and the Governments of the freely associated states of the Marshall Islands and the Federated States of Micronesia in regard to these relationships of free association derive from and are as set forth in this Compact.

TITLE ONE

GOVERNMENTAL RELATIONS

Article I

Self-Government

Section 111

The peoples of the Marshall Islands and the Federated States of Micronesia, acting through the Governments established under their respective Constitutions, are self-governing.

Article II

Foreign Affairs

Section 121

(a) The Governments of the Marshall Islands and the Federated States of Micronesia have the capacity to conduct foreign affairs and shall do so in their own name and right, except as otherwise provided in this Compact.

(b) The foreign affairs capacity of the Governments of the Marshall Islands and the Federated States of Micronesia includes:

(1) the conduct of foreign affairs relating to law of the sea and marine resources matters, including the harvesting, conservation, exploration or exploitation of living and non-living resources from the sea, seabed or subsoil to the full extent recognized under international law;

(2) the conduct of their commercial, diplomatic, consular, economic, trade, banking, postal, civil aviation, communications, and cultural relations, including negotiations for the receipt of developmental loans and grants and the conclusion of arrangements with other governments and international and intergovernmental organizations, including any matters specially benefiting their individual citizens.

(c) The Government of the United States recognizes that the Governments of the Marshall Islands and the Federated States of Micronesia have the capacity to enter into, in their own name and right, treaties and other international agreements with governments and regional and international organizations.

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(d) In the conduct of their foreign affairs, the Governments of the Marshall Islands and the Federated States of Micronesia confirm that they shall act in accordance with principles of international law and shall settle their international disputes by peaceful means.

Section 122

The Government of the United States shall support applications by the Governments of the Marshall Islands and the Federated States of Micronesia for mem-

bership or other participation in regional or international organizations as may be mutually agreed. The Government of the United States agrees to accept for training and instruction at the Foreign Service Institute, established under 22 U.S.C. 4021, citizens of the Marshall Islands and the Federated States of Micronesia. The qualifications of candidates for such training and instruction and all other terms and conditions of participation by citizens of the Marshall Islands and the Federated States of Micronesia in Foreign Service Institute programs shall be as mutually agreed between the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia.

Section 123

(a) In recognition of the authority and responsibility of the Government of the United States under Title Three, the Governments of the Marshall Islands and the Federated States of Micronesia shall consult, in the conduct of their foreign affairs, with the Government of the United States.

(b) In recognition of the respective foreign affairs capacities of the Governments of the Marshall Islands and the Federated States of Micronesia, the Government of the United States, in the conduct of its foreign affairs, shall consult with the Government of the Marshall Islands or the Federated States of Micronesia on matters which the Government of the United States regards as relating to or affecting any such Government.

Section 124

The Government of the United States may assist or act on behalf of the Government of the Marshall Islands

or the Federated States of Micronesia in the area of foreign affairs as may be requested and mutually agreed from time to time. The Government of the United States shall not be responsible to third parties for the actions of the Government of the Marshall Islands or the Federated States of Micronesia undertaken with the assistance or through the agency of the Government of the United States pursuant to this Section unless expressly agreed.

Section 125

The Government of the United States shall not be responsible for nor obligated by any actions taken by the Government of the Marshall Islands or the Federated States of Micronesia in the area of foreign affairs, except as may from time to time be expressly agreed.

Section 126

At the request of the Government of the Marshall Islands or the Federated States of Micronesia and subject to the consent of the receiving state, the Government of the United States shall extend consular assistance on the same basis as for citizens of the United States to citizens of the Marshall Islands and the Federated States [1803] of Micronesia for travel outside the Marshall Islands and the Federated States of Micronesia, the United States and its territories and possessions.

Section 127

Except as otherwise provided in this Compact or its related agreements, all obligations, responsibilities, rights and benefits of the Government of the United States as Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agree-

ment to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact are no longer assumed and enjoyed by the Government of the United States.

Article III

Communications

Section 131

(a) The Governments of the Marshall Islands and the Federated States of Micronesia have full authority and responsibility to regulate their respective domestic and foreign communications, and the Government of the United States shall provide communications assistance in accordance with the terms of a separate agreement which shall come into effect simultaneously with this Compact, and such agreement shall remain in effect until such time as any election is made pursuant to Section 131(b) and which shall provide for the following:

(1) the Government of the United States remains the sole administration entitled to make notification to the International Frequency Registration Board of the International Telecommunications Union of frequency assignments to radio communications stations respectively in the Marshall Islands and the Federated States of Micronesia; and to submit to the International Frequency Registration Board seasonal schedules for the broadcasting stations respectively in the Marshall Islands and the Federated States of Micronesia in the bands allocated exclusively to the broadcasting service between 5,950 and 26,100 kHz and in any other additional frequency bands that may be allocated to use by high frequency broadcasting stations; and

(2) the United States Federal Communications Commission has jurisdiction, pursuant to the Communications Act of 1934, 47 U.S. C. 151 et seq., and the Communications Satellite Act of 1962, 47 U.S.C. 721 et seq., over all domestic and foreign communications services furnished by means of satellite earth terminal stations where such stations are owned or operated by United States common carriers and are located in the Marshall Islands or the Federated States of Micronesia.

(b) The Government of the Marshall Islands or the Federated States of Micronesia may elect at any time to undertake the functions enumerated in Section 131(a) and previously performed by the Government of the United States. Upon such election, the Government of the United States shall so notify the International Frequency Registration Board and shall take such other actions as may be necessary to transfer to the electing Government the notification authority referred to in Section 131(a) and all rights deriving from [1804] the previous exercise of any such notification authority by the Government of the United States.

Section 132

The Governments of the Marshall Islands and the Federated States of Micronesia shall permit the Government of the United States to operate telecommunications services in the Marshall Islands and the Federated States of Micronesia to the extent necessary to fulfill the obligations of the Government of the United States under this Compact in accordance with the terms of separate agreements which shall come into effect simultaneously with this Compact.

Article IV

Immigration

Section 141

(a) Any person in the following categories may enter into, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States and its territories and possessions without regard to paragraphs (14), (20), and (26) of section 212(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), (20), and (26):

(1) a person who, on the day preceding the effective date of this Compact, is a citizen of the Trust Territory of the Pacific Islands, as defined in Title 53 of the Trust Territory Code in force on January 1, 1979, and has become a citizen of the Marshall Islands or the Federated States of Micronesia;

(2) a person who acquires the citizenship of the Marshall Islands or the Federated States of Micronesia at birth, on or after the effective date of the respective Constitution;

(3) a naturalized citizen of the Marshall Islands or the Federated States of Micronesia who has been an actual resident there for not less than five years after attaining such naturalization and who holds a certificate of actual residence; or

(4) a person entitled to citizenship in the Marshall Islands by lineal descent whose name is included in a list to be furnished by the Government of the Marshall Islands to the United States Immigration and Naturalization Service and any descendants of such persons, provided that such person

holds a certificate of lineal descent issued by the Government of the Marshall Islands.

Such persons shall be considered to have the permission of the Attorney General of the United States to accept employment in the United States.

(b) The right of such persons to establish habitual residence in a territory or possession of the United States may, however, be subjected to nondiscriminatory limitations provided for:

(1) in statutes or regulations of the United States; or

(2) in those statutes or regulations of the territory or possession concerned which are authorized by the laws of the United States.

(c) Section 141(a) does not confer on a citizen of the Marshall Islands or the Federated States of Micronesia the right to establish the residence necessary for naturalization under the Immigration and Nationality Act, or to petition for benefits for alien relatives under that Act. Section 141(a), however, shall not prevent a citizen of [1805] the Marshall Islands or the Federated States of Micronesia from otherwise acquiring such rights or lawful permanent resident alien status in the United States.

Section 142

(a) Any citizen or national of the United States may enter into, lawfully engage in occupations, and reside in the Marshall Islands or the Federated States of Micronesia, subject to the rights of those Governments to deny entry to or deport any such citizen or national as an undesirable alien. A citizen or national of the United States may establish habitual residence or domicile in the Marshall Islands or the Federated States of Micro-

nesia only in accordance with the laws of the jurisdiction in which habitual residence or domicile is sought.

(b) With respect to the subject matter of this Section, the Government of the Marshall Islands or the Federated States of Micronesia shall accord to citizens and nationals of the United States treatment no less favorable than that accorded to citizens of other countries; any denial of entry to or deportation of a citizen or national of the United States as an undesirable alien must be pursuant to reasonable statutory grounds.

Section 143

(a) The privileges set forth in Section 141 and 142 shall not apply to any person who takes an affirmative step to preserve or acquire a citizenship or nationality other than that of the Marshall Islands, the Federated States of Micronesia or the United States.

(b) Every person having the privileges set forth in Sections 141 and 142 who possesses a citizenship or nationality other than that of the Marshall Islands, the Federated States of Micronesia or the United States ceases to have these privileges two years after the effective date of this Compact, or within six months after becoming 21 years of age, whichever comes later, unless such person executes an oath of renunciation of that other citizenship or nationality.

Section 144

(a) A citizen or national of the United States who, after notification to the Government of the United States of an intention to employ such person by the Government of the Marshall Islands or the Federated States of Micronesia, commences employment with such Government shall not be deprived of his United States nationality pursuant to Section 349(a)(2) and

(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2) and (a)(4).

(b) Upon such notification by the Government of the Marshall Islands or the Federated States of Micronesia, the Government of the United States may consult with or provide information to the notifying Government concerning the prospective employee, subject to the provisions of the Privacy Act, 5 U.S.C. 552a.

(c) The requirement of prior notification shall not apply to those citizens or nationals of the United States who are employed by the Government of the Marshall Islands or the Federated States of Micronesia on the effective date of this Compact with respect to the positions held by them at that time.

[1806]

Article V

Representation

Section 151

The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia may establish and maintain representative offices in the capital of the other for the purpose of maintaining close and regular consultations on matters arising in the course of the relationship of free association and conducting other government business. The Governments may establish and maintain additional offices on terms and in locations as may be mutually agreed.

Section 152

(a) The premises of such representative offices, and their archives wherever located, shall be inviolable. The property and assets of such representative offices shall be immune from search, requisition, attachment

and any form of seizure unless such immunity is expressly waived. Official communications in transit shall be inviolable and accorded the freedom and protections accorded by recognized principles of international law to official communications of a diplomatic mission.

(b) Persons designated by the sending Government may serve in the capacity of its resident representatives with the consent of the receiving Government. Such designated persons shall be immune from civil and criminal process relating to words spoken or written and all acts performed by them in their official capacity and falling within their functions as such representatives, except insofar as such immunity may be expressly waived by the sending Government. While serving in a resident representative capacity, such designated persons shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by a competent judicial authority, and such persons shall enjoy immunity from seizure of personal property, immigration restrictions, and laws relating to alien registration, fingerprinting, and the registration of foreign agents.

(c) The sending Governments and their respective assets, income and other property shall be exempt from all direct taxes, except those direct taxes representing payment for specific goods and services, and shall be exempt from all customs duties and restrictions on the import or export of articles required for the official functions and personal use of their representatives and representative offices.

(d) Persons designated by the sending Government to serve in the capacity of its resident representatives shall enjoy the same taxation exemptions as are set

forth in Article 34 of the Vienna Convention on Diplomatic Relations.

(e) The privileges, exemptions and immunities accorded under this Section are not for the personal benefit of the individuals concerned but are to safeguard the independent exercise of their official functions. Without prejudice to those privileges, exemptions and immunities, it is the duty of all such persons to respect the laws and regulations of the Government to which they are assigned.

[1807]

Section 153

(a) Any citizen or national of the United States who, after consultation between the designating Government and the Government of the United States, is designated by the Government of the Marshall Islands or the Federated States of Micronesia as its agent, shall enjoy exemption from the requirements of the laws of the United States relating to the registration of foreign agents. The Government of the United States shall promptly comply with a request for consultation made by the prospective designating Government. During the course of the consultation, the Government of the United States may, in its discretion, and subject to the provisions of the Privacy Act, 5 U.S.C. 552a, transmit such information concerning the prospective designee as may be available to it to the prospective designating Government.

(b) Any citizen or national of the United States may be employed by the Government of the Marshall Islands or the Federated States of Micronesia to represent to foreign governments, officers or agents thereof the positions of the Government of the Marshall Islands

or the Federated States of Micronesia, without regard to the provisions of 18 U.S.C. 953.

Article VI

Environmental Protection

Section 161

The Governments of the United States, the Marshall Islands and the Federated States of Micronesia declare that it is their policy to promote efforts to prevent or eliminate damage to the environment and biosphere and to enrich understanding of the natural resources of the Marshall Islands and the Federated States of Micronesia. In order to carry out this policy, the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia agree to the following mutual and reciprocal undertakings.

(a) The Government of the United States:

(1) shall continue to apply the environmental controls in effect on the day preceding the effective date of this Compact to those of its continuing activities subject to Section 161(a)(2), unless and until those controls are modified under Sections 161(a)(3) and 161(a)(4);

(2) shall apply the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 et seq., to its activities under the Compact and its related agreements as if the Marshall Islands and the Federated States of Micronesia were the United States;

(3) shall comply also, in the conduct of any activity requiring the preparation of an Environmental Impact Statement under Section 161(a)(2), with standards substantively similar to those required by the following laws of the United States,

taking into account the particular environments of the Marshall Islands and the Federated States of Micronesia: the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 et seq.; The Clean Air Act, 77 Stat. 392, 42 U.S.C. Supp. 7401 et seq.; the Clean Water Act (Federal Water Pollution Control Act), 86 Stat. 896, 33 U.S.C. 1251 et seq., the Ocean Dumping Act (Title I of the Marine Protection, Research and Sanctuaries Act of 1972), 86 Stat. 1053, 33 U.S.C. 1411 et seq.; the Toxic Substances Control Act, 90 Stat. 2003, 15 U.S.C. 2601 et seq.; the Resources Conservation and Recovery Act of 1976, 90 Stat. 2796, 42 U.S.C. 6901 [1808] et seq.; and such other environ-mental protection laws of the United States as may be mutually agreed from time to time with the Government of the Marshall Islands or the Federated States of Micronesia; and

(4) shall develop, prior to conducting any activity requiring the preparation of an Environmental Impact Statement under Section 161(a)(2), appropriate mechanisms, including regulations or other judicially reviewable standards and procedures, to regulate its activities governed by Section 161(a)(3) in the Marshall Islands and the Federated States of Micronesia in a manner appropriate to the special governmental relationship set forth in this Compact. The agencies of the Government of the United States designated by law to administer the laws set forth in Section 161(a)(3) shall participate as appropriate in the development of any regulation, standard or procedure under this Section, and the Government of the United States shall provide the affected Government of the Marshall Islands or the Federated States of Micronesia with the opportunity to comment during such development.

(b) The Governments of the Marshall Islands and the Federated States of Micronesia shall develop standards and procedures to protect their environments. As a reciprocal obligation to the undertakings of the Government of the United States under this Article, the Governments of the Marshall Islands and the Federated States of Micronesia, taking into account their particular environments, shall develop standards for environmental protection substantively similar to those required of the Government of the United States by Section 161(a)(3) prior to their conducting activities in the Marshall Islands and the Federated States of Micronesia, respectively, substantively equivalent to activities conducted there by the Government of the United States and, as a further reciprocal obligation, shall enforce those standards.

(c) Section 161(a), including any standard or procedure applicable thereunder, and Section 161(b) may be modified or superseded in whole or in part by agreement of the Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia.

(d) In the event that an Environmental Impact Statement is no longer required under the laws of the United States for major federal actions significantly affecting the quality of the human environment, the regulatory regime established under Sections 161(a)(3) and 161(a)(4) shall continue to apply to such activities of the Government of the United States until amended by mutual agreement.

(e) The President of the United States may exempt any of the activities of the Government of the United States under this Compact and its related agreements from any environmental standard or procedure which

may be applicable under Sections 161(a)(3) and 161(a)(4) if the President determines it to be in the paramount interest of the Government of the United States to do so, consistent with Title Three of this Compact and the obligations of the Government of the United States under international law. Prior to any decision pursuant to this subsection, the views of the affected Government of the Marshall Islands or t[h]e Federated States of Micronesia shall be sought and considered to the extent practicable. If the President grants such an exemption, to the extent practicable, [1809] a report with his reasons for granting such exemption shall be given promptly to the affected Government.

(f) The laws of the United States referred to in Section 161(a)(3) shall apply to the activities of the Government of the United States under this Compact and its related agreements only to the extent provided for in this Section.

Section 162

The Government of the Marshall Islands or the Federated States of Micronesia may bring an action for judicial review of any administrative agency action or any activity of the Government of the United States pursuant to Sections 161(a), 161(d) or 161(e) or for enforcement of the obligations of the Government of the United States arising thereunder. The United States District Court for the District of Hawaii and the United States District Court for the District of Columbia shall have jurisdiction over such action or activity, and over actions brought under Section 172(b) which relate to the activities of the Government of the United States and its officers and employees, governed by Section 161, provided that:

(a) Such actions may only be civil actions for any appropriate civil relief other than punitive damages against the Government of the United States or, where required by law, its officers in their official capacity; no criminal actions may arise under this Section.

(b) Actions brought pursuant to this Section may be initiated only by the Government concerned.

(c) Administrative agency actions arising under Section 161 shall be reviewed pursuant to the standard of judicial review set forth in 5 U. S.C. 706.

(d) The District Court shall have jurisdiction to issue all necessary processes, and the Government of the United States agrees to submit itself to the jurisdiction of the court; decisions of the District Court shall be reviewable in the United States Court of Appeals for the Ninth Circuit or the United States Court of Appeals for the District of Columbia, respectively, or in the United States Supreme Court as provided by the laws of the United States.

(e) The judicial remedy provided for in this Section shall be the exclusive remedy for the judicial review or enforcement of the obligations of the Government of the United States under this Article and actions brought under Section 172(b) which relate to the activities of the Government of the United States and its officers and employees governed by Section 161.

(f) In actions pursuant to this Section, the Governments of the Marshall Islands and the Federated States of Micronesia shall be treated as if they were United States citizens.

Section 163

(a) For the purpose of gathering data necessary to study the environmental effects of activities of the

Government of the United States subject to the requirements of this Article, the Governments of the Marshall Islands and the Federated States of Micronesia shall be granted access to facilities operated by the Government of the United States in the Marshall Islands and the Federated States of Micronesia, to the extent necessary for this purpose, except to the extent such access would unreasonably interfere with the exercise of the authority and responsibility of the Government of the United States under Title Three.

[1810]

(b) The Government of the United States, in turn, shall be granted access to the Marshall Islands or the Federated States of Micronesia for the purpose of gathering data necessary to discharge its obligations under this Article, except to the extent such access would unreasonably interfere with the exercise of the authority and responsibility of the Government of the Marshall Islands or the Federated States of Micronesia under Title One, and to the extent necessary for this purpose shall be granted access to documents and other information to the same extent similar access is provided those Governments under the Freedom of Information Act, 5 U.S.C. 552.

(c) The Governments of the Marshall Islands and the Federated States of Micronesia shall not impede efforts by the Government of the United States to comply with applicable standards and procedures.

Article VII

General Legal Provisions

Section 171

Except as provided in this Compact or its related agreements, the application of the laws of the United

States to the Trust Territory of the Pacific Islands by virtue of the Trusteeship Agreement ceases with respect to the Marshall Islands and the Federated States of Micronesia as of the effective date of this Compact.

Section 172

(a) Every citizen of the Marshall Islands or the Federated States of Micronesia who is not a resident of the United States shall enjoy the rights and remedies under the laws of the United States enjoyed by any non-resident alien.

(b) The Governments of the Marshall Islands and the Federated States of Micronesia and every citizen of the Marshall Islands or the Federated States of Micronesia shall be considered a "person" within the meaning of the Freedom of Information Act, 5 U.S.C. 552, and of the judicial review provisions of the Administrative Procedure Act, 5 U.S. C. 701-706, except that only the Government of the Marshall Islands or the Federated States of Micronesia may seek judicial review under the Administrative Procedure Act or judicial enforcement under the Freedom of Information Act when such judicial review or enforcement relates to the activities of the Government of the United States governed by Section 161 and 162.

Section 173

The Governments of the United States, the Marshall Islands and the Federated States of Micronesia agree to adopt and enforce such measures, consistent with this Compact and its related agreements, as may be necessary to protect the personnel, property, installations, services, programs and official archives and documents maintained by the Government of the United States in the Marshall Islands and the Feder-

ated States of Micronesia pursuant to this Compact and its related agreements and by those Governments in the United States pursuant to this Compact and its related agreements.

Section 174

Except as otherwise provided in this Compact and its related agreements:

[1811]

(a) The Governments of the Marshall Islands and the Federated States of Micronesia shall be immune from the jurisdiction of the courts of the United States, and the Government of the United States shall be immune from the jurisdiction of the courts of the Marshall Islands and the Federated States of Micronesia.

(b) The Government of the United States accepts responsibility for and shall pay:

(1) any unpaid money judgment rendered by the High Court of the Trust Territory of the Pacific Islands against the Government of the Trust Territory of the Pacific Islands or the Government of the United States with regard to any cause of action arising as a result of acts or omissions of the Government of the Trust Territory of the Pacific Islands or the Government of the United States prior to the effective date of this Compact;

(2) any claim settled by the claimant and the Government of the Trust Territory of the Pacific Islands but not paid as of the effective date of this Compact; and

(3) settlement of any administrative claim or of any action before a court of the Trust Territory of the Pacific Islands, pending as of the effective date

of this Compact, against the Government of the Trust Territory of the Pacific Islands or the Government of the United States, arising as a result of acts or omissions of the Government of the Trust Territory of the Pacific Islands or the Government of the United States.

(c) Any claim not referred to in Section 174(b) and arising from an act or omission of the Government of the Trust Territory of the Pacific Islands or the Government of the United States prior to the effective date of this Compact shall be adjudicated in the same manner as a claim adjudicated according to Section 174(d). In any claim against the Government of the Trust Territory of the Pacific Islands, the Government of the United States shall stand in the place of the Government of the Trust Territory of the Pacific Islands. A judgment on any claim referred to in Section 174(b) or this subsection, not otherwise satisfied by the Government of the United States, may be presented for certification to the United States Court of Appeals for the Federal Circuit, or its successor court, which shall have jurisdiction therefor, notwithstanding the provisions of 28 U.S.C. 1502, and which court's decisions shall be reviewable as provided by the laws of the United States. The United States Court of Appeals for the Federal Circuit shall certify such judgment, and order payment thereof, unless it finds, after a hearing, that such judgment is manifestly erroneous as to law or fact, or manifestly excessive. In either of such cases the United States Court of Appeals for the Federal Circuit shall have jurisdiction to modify such judgment.

(d) The Governments of the Marshall Islands and the Federated States of Micronesia shall not be immune from the jurisdiction of the courts of the United States, and the Government of the United States shall

not be immune from the jurisdiction of the courts of the Marshall Islands and the Federated States of Micronesia in any case in which the action is based on a commercial activity of the defendant Government where the action is brought, or in a case in which damages are sought for personal injury or death or damage to or loss of property occurring where the action is brought.

[1812]

Section 175

A separate agreement, which shall come into effect simultaneously with this Compact, shall be concluded between the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia regarding mutual assistance and cooperation in law enforcement matters including the pursuit, capture, imprisonment and extradition of fugitives from justice and the transfer of prisoners. The separate agreement shall have the force of law. In the United States, the laws of the United States governing international extradition, including 18 U.S.C. 3184, 3186 and 3188-3195, shall be applicable to the extradition of fugitives under the separate agreement, and the laws of the United States governing the transfer of prisoners, including 18 U.S.C. 4100-4115, shall be applicable to the transfer of prisoners under the separate agreement.

Section 176

The Governments of the Marshall Islands and the Federated States of Micronesia confirm that final judgments in civil cases rendered by any court of the Trust Territory of the Pacific Islands shall continue in full force and effect, subject to the constitutional power of the courts of the Marshall Islands and the Federated

States of Micronesia to grant relief from judgments in appropriate cases.

Section 177

(a) The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.

(b) The Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise, for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs and radiological monitoring activities and for such additional programs and activities as may be mutually agreed, and for the assumption by the Government of the Marshall Islands of responsibility for enforcement of limitations on the utilization of affected areas developed in cooperation with the Government of the United States and for the assistance by the Government of the United States in the exercise of such responsibility as may be mutually agreed. This separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its own terms.

(c) The Government of the United States shall provide to the Government of the Marshall Islands, on a grant basis, the amount of $150 million to be paid and distributed in accordance with the separate agreement referred to in this Section, and shall provide the services and programs set forth in this separate agreement, the language of which is incorporate into this Compact.

[1813]

Section 178

(a) The federal agencies of the Government of the United States which provide the services and related programs in the Marshall Islands or the Federated States of Micronesia pursuant to Articles II and III of Title Two are authorized to settle and pay tort claims arising in the Marshall Islands or the Federated States of Micronesia from the activities of such agencies or from the acts or omissions of the employees of such agencies. Except as provided in Section 178(b), the provisions of 28 U.S.C. 2672 and 31 U.S.C. 1304 shall apply exclusively to such administrative settlements and payments.

(b) Claims under Section 178(a) which cannot be settled under Section 178(a) shall be disposed of exclusively in accordance with Article II of Title Four. Arbitration awards rendered pursuant to this subsection shall be paid out of funds under 31 U.S.C. 1304.

(c) The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia shall, in the separate agreements referred to in Section 232, provide for:

(1) the administrative settlement of claims referred to in Section 178(a), including designation of

local agents in the Marshall Islands and each State of the Federated States of Micronesia; such agents to be empowered to accept, investigate and settle such claims, in a timely manner, as provided in such separate agreements; and

(2) arbitration, referred to in Section 178(b), in a timely manner, at a site convenient to the claimant, in the event a claim is not otherwise settled pursuant to Section 178(a).

(d) The provisions of Section 174(d) shall not apply to claims covered by this Section.

TITLE TWO

ECONOMIC RELATIONS

Article I

Grant Assistance

Section 211

(a) In order to assist the Governments of the Marshall Islands and the Federated States of Micronesia in their efforts to advance the economic self-sufficiency of their peoples and in recognition of the special relationship that exists between them and the United States, the Government of the United States shall provide on a grant basis the following amounts:

(1) to the Government of the Marshall Islands, $26.1 million annually for five years commencing on the effective date of this Compact, $22.1 million annually for five years commencing on the fifth anniversary of the effective date of this Compact, and $19.1 million annually for five years commencing on the tenth anniversary of this Compact. Over this fifteen-year period, the Government of the Marshall Islands shall dedicate an average of no less

than 40 percent of these amounts to the capital account subject to provision for revision of this percentage incorporated into the plan referred to in Section 211(b); and

(2) to the Government of the Federated States of Micronesia, $60 million annually for five years commencing on the effective date of this Compact, $51 million annually for five years commencing on the fifth anniversary of the effective date of this [1814] Compact, and $40 million annually for five years commencing on the tenth anniversary of the effective date of this Compact. Over this fifteen year period, the Government of the Federated States of Micronesia shall dedicate an average of no less than 40 percent of these amounts annually to the capital account subject to provision for revision of this percentage incorporated into the plan referred to in Section 211(b). To take into account the special nature of the assistance, to be provided under this paragraph and Section 212(b), 213(c), 214(c), 215(a)(3), 215(b)(3), 216(a), 216(b), 221(a), and 221(b), the division of these amounts among the national and state governments of the Federated States of Micronesia shall be certified to the Government of the United States by the Government of the Federated States of Micronesia.

(b) The annual expenditure of the grant amounts specified for the capital account in Section 211(a) by the Governments of the Marshall Islands and the Federated States of Micronesia shall be in accordance with official overall economic development plans provided by those Governments and concurred in by the Government of the United States prior to the effective date of this Compact. These plans may be amended from time

to time by the Government of the Marshall Islands or the Federated States of Micronesia.

(c) The Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia recognize that the achievement of the goals of the plans referred to in Section 211(b) depends upon the availability of adequate internal revenue as well as economic assistance from sources outside of the Marshall Islands and the Federated States of Micronesia, including the Government of the United States, and may, in addition, be affected by the impact of exceptional economically adverse circumstances. Each of the Governments of the Marshall Islands and the Federated States of Micronesia shall therefore report annually to the President of the United States and to the Congress of the United States on the implementation of the plans and on their use of the funds specified in this Article. These reports shall outline the achievements of the plans to date and the need, if any, for an additional authorization and appropriation of economic assistance for that year to account for any exceptional, economically adverse circumstances. It is underst[o]od that the Government of the United States cannot be committed by this Section to seek or support such additional economic assistance.

Section 212

In recognition of the special development needs of the Federated States of Micronesia, the Government of the United States shall provide to the Government of the Federated States of Micronesia $1 million annually for fourteen years commencing on the first anniversary of the effective date of this Compact. This amount may be used by the Government of the Federated States of Micronesia to defray current account expenditures at-

tendant to the operation of the United States military Civic Action Teams made available in accordance with the separate agreement referred to in Section 227.

Section 213

(a) The Government of the United States shall provide on a grant basis $1.9 million annually to the Government of the Marshall Islands in conjunction with Section 321(a). The Government of the [1815] Marshall Islands, in its use of such funds, shall take into account the impact of the activities of the Government of the United States in the Kwajalein Atoll area of the Marshall Islands.

(b) The Government of the United States shall provide on a grant basis to the Government of the Federated States of Micronesia the sum of $160,000 in conjunction with Section 321(a). This sum shall be made available concurrently with the grant assistance provided pursuant to this Article during the first year after the effective date of this Compact. The Government of the Federated States of Micronesia, in its use of such funds, shall take into account the impact of the activities of the Government of the United States in Yap State, Federated States of Micronesia.

Section 214

As a contribution to efforts aimed at achieving increased self-sufficiency in energy production, the Government of the United States shall provide on a current account grant basis for fourteen years commencing on the first anniversary of the effective date of this Compact the following amounts:

(a) To the Government of the Marshall Islands, $2 million annually.

(b) To the Government of the Federated States of Micronesia, $3 million annually.

Section 215

(a) As a contribution to the current account operations and maintenance of communications systems, the Government of the United States shall provide on a grant basis for fifteen years commencing on the effective date of this Compact the following amounts:

(1) to the Government of the Marshall Islands, $300,000 annually; and

(2) to the Government of the Federated States of Micronesia, $600,000 annually.

(b) For the purpose of acquiring such communications hardware as may be located within the Marshall Islands and the Federated States of Micronesia or for such other current or capital account activity as may be selected, the Government of the United States shall provide, concurrently with the grant assistance provided pursuant to this Article during the first year after the effective date of this Compact, the sum of $9 million to be allocated as follows:

(1) to the Government of the Marshall Islands, $3 million; and

(2) to the Government of the Federated States of Micronesia, $6 million.

Section 216

(a) The Government of the United States shall provide on a current account basis an annual grant of $5.369 million for fifteen years commencing on the effective date of this Compact for the purposes set forth below:

(1) $890,000 annually for the surveillance and enforcement by the Governments of the Marshall Islands and the Federated States of Micronesia of their respective maritime zones;

(2) $1.791 million annually for health and medical programs, including referrals to hospital and treatment centers; and

(3) $2.687 million annually for a scholarship fund or funds to support the post-secondary education of citizens of the Marshall Islands and the Federated States of Micronesia attending [1816] United States accredited, post-secondary institutions in the United States, its territories and possessions, the Marshall Islands or the Federated States of Micronesia. The curricula criteria for the award of scholarships shall be designed to advance the purposes of the plans referred to in Section 211(b).

(b) The Government of the United States shall provide the sum of $1.333 million as a contribution to the commencement of activities pursuant to Section 216(a)(1).

(c) The annual grants referred to in Section 216(a) and the sum referred to in Section 216(b) shall be made available by the Government of the United States promptly after it receives instruction for their distribution agreed upon by the Governments of the Marshall Islands and the Federated States of Micronesia.

Section 217

Except as otherwise provided, the amounts stated in Sections 211, 212, 214, 215 and 231 shall be adjusted for each Fiscal Year by the percent which equals two-thirds of the percentage change in the United States

Gross National Product Implicit Price Deflator, or seven percent, whichever is less in any one year, using the beginning of Fiscal Year 1981 as the base.

Section 218

If in any year the funds made available by the Government of the United States for that year pursuant to this Article or Section 231 are not completely obligated by the recipient Government, the unobligated balances s[h]all remain available in addition to the funds to be provided in subsequent years.

Section 219

All funds previously appropriated to the Trust Territory of the Pacific Islands which are unobligated by the Government of the Trust Territory of the Pacific Islands as of the effective date of this Compact shall accrue to the Governments of the Marshall Islands and the Federated States of Micronesia for the purposes for which such funds were originally appropriated as determined by the Government of the United States.

Article II

Program Assistance

Section 221

(a) The Government of the United States shall make available to the Marshall Islands and the Federated States of Micronesia, in accordance with and to the extent provided in the separate agreements referred to in section 232, without compensation and at the levels equivalent to those available to the Trust Territory of the Pacific Islands during the year prior to the effective date of this Compact, the services and related programs:

(1) of the United States Weather Service;

(2) of the United States Federal Emergency Management Agency;

(3) provided pursuant to the Postal Reorganization Act, 39 U. S.C. 101 et seq.;

(4) of the United States Federal Aviation Administration; and

(5) of the United States Civil Aeronautics Board or its successor agencies which has the authority to implement the provi-[1817]sions of paragraph 5 of Article IX of such separate agreements, the language of which is incorporated into this Compact.

(b) The Government of the United States, recognizing the special needs of the Marshall Islands and the Federated States of Micronesia particularly in the fields of education and health care, shall make available, as provided by the laws of the United States, the annual amount of $10 million which shall be allocated in accordance with the provisions of the separate agreement referred to in Section 232.

(c) The Government of the United States shall make available to the Marshall Islands and the Federated States of Micronesia such alternate energy development projects, studies and conservation measures as are applicable to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact, for the purposes and duration provided in the laws of the United States.

(d) The Government of the United States shall have and exercise such authority as is necessary for the purposes of this Article and as is set forth in the separate agreements referred to in Section 232, which shall also set forth the extent to which services and programs

shall be provided to the Marshall Islands and the Federated States of Micronesia.

Section 222

The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia shall consult regularly or upon request regarding:

(a) the economic development of the Marshall Islands or the Federated States of Micronesia; or

(b) the services and programs referred to in this Article. These services and programs shall continue to be provided by the Government of the United States unless their modification is provided by mutual agreement or their termination in w[h]ole or in part is requested by any recipient Government.

Section 223

The citizens of the Marshall Islands and the Federated States of Micronesia who are receiving post-secondary educational assistance from the Government of the United States on the day preceding the effective date of this Compact shall continue to be eligible, if otherwise qualified, to receive such assistance to complete their academic programs for a maximum of four years after the effective date of this Compact.

Section 224

The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia may agree from time to time to the extension of additional United States grant assistance, services and programs as provided by the Laws of the United States, to the Marshall Islands or the Federated States of Micronesia, respectively.

Section 225

The Governments of the Marshall Islands and the Federated States of Micronesia shall make available to the Government of the United States at no cost such land as may be necessary for the operations of the services and programs provided pursuant to this Article, and such facilities as are provided by the Government of the Marshall Islands or the Federated States of Micronesia at no cost t[o] [1818] the Government of the United States as of the effective date of this Compact or as may be mutually agreed thereafter.

Section 226

The Governments of the Marshall Islands and the Federated States of Micronesia may request, from time to time, technical assistance from the federal agencies and institutions of the Government of the United States, which are authorized to grant such technical assistance in accordance with its laws and which shall grant such technical assistance in a manner which gives priority consideration to the Marshall Islands and the Federated States of Micronesia over other recipients not a part of the United States, its territories or possessions. The Government of the United States shall coordinate the provision of such technical assistance in consultation with the respective recipient Government.

Section 227

In recognition of the special development needs of the Federated States of Micronesia, the Government of the United States shall make available United States military Civic Action Teams for use in the Federated States of Micronesia under terms and conditions specified in a separate agreement which shall come into effect simultaneously with this Compact.

Article III

Administrative Provisions

Section 231

Upon the thirteenth anniversary of the effective dat[e] of this Compact, the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia shall commence negotiations regarding those provisions of this Compact which expire on the fifteenth anniversary of its effective date. If these negotiations are not concluded by the fifteenth anniversary of the effective date of this Compact, the period of negotiations shall extend for not more than two additional years, during which time the provisions of this Compact including Title Three shall remain in full force and effect. During this additional period of negotiations, the Government of the United States shall continue its assistance to the Governments with which it is negotiating pursuant to this Section at a level which is the average of the annual amounts granted pursuant to Sections 211, 212, 213, 214, 215 and 216 during the first fifteen years of this Compact. The average annual amount paid pursuant to Sections 211, 212, 214 and 215 shall be adjusted pursuant to Section 217.

Section 232

The specific nature, extent and contractual arrangements of the services and programs provided for in Section 221 as well as the legal status of agencies of the Government of the United States, their civilian employees and contractors, and the dependents of such personnel while present in the Marshall Islands or the Federated States of Micronesia, and other arrangements in connection with a service or program furnished by the Government of the United States, are set

forth in separate agreements which shall come into effect s[im]ultaneously with this Compact.

[1819]

Section 233

The Government of the United States, in consultation with the Governments of the Marshall Islands and the Federated States of Micronesia, shall determine and implement procedures for the periodic audit of all grants and other assistance made under Article I of this Title and of all funds expended for the services and programs provided under Article II of this Title. Such audits shall be conducted on an annual basis during the first five years following the effective date of this Compact and shall be at no cost to the Government of the Marshall Islands or the Federated States of Micronesia.

Section 234

Title to the property of the Government of the United States situated in the Trust Territory of the Pacific Islands or acquired for or used by the Government of the Trust Territory of the Pacific Islands on or before the day preceding the effective date of this Compact shall, without reimbursement or transfer of funds, vest in the Government of the Marshall Islands and the Federated States of Micronesia as set forth in a separate agreement which shall come into effect simultaneously with this Compact. The provisions of this Section shall not apply to the property of the Government of the United States for which the Government of the United States determines a continuing requirement.

Section 235

(a) Funds held in trust by the High Commissioner of the Trust Territory of the Pacific Islands, in his official capacity, as of the effective date of this Compact

shall remain available as trust funds to their designated beneficiaries. The Government of the United States, in consultation with the Government of the Marshall Islands or the Federated States of Micronesia, shall appoint a new trustee who shall exercise the functions formerly exercised by the High Commissioner of the Trust Territory of the Pacific Islands.

(b) To provide for the continuity of administration, and to assure the Governments of the Marshall Islands and the Federated States of Micronesia that the purposes of the laws of the United States are carried out and that the funds of any other trust fund in which the High Commissioner of the Trust Territory of the Pacific Islands has authority of a statutory or customary nature shall remain available as trust funds to their designated beneficiaries, the Government of the United States agrees to assume the authority formerly vested in the High Commissioner of the Trust Territory of the Pacific Islands.

Section 236

Except as otherwise provided, approval of this Compact by the Government of the United States shall constitute a pledge of the full faith and credit of the United States for the full payment of the sums and amounts specified in Articles I and III of this Title. The obligation of the United States under Articles I and III of this Title shall be enforceable in the United States Claims Court, or its successor court, which shall have jurisdiction in cases arising under this Section, notwithstanding the provisions of 28 U.S.C. 1502, and which court's decisions shall be reviewable as provided by the laws of the United States.

[1820]

Article IV

Trade

Section 241

The Marshall Islands and the Federated States of Micronesia are not included in the customs territory of the United States.

Section 242

For the purpose of assessing duties on their products imported into the customs territory of the United States, the Marshall Islands and the Federated States of Micronesia shall be treated as if they were insular possessions of the United States within the meaning of General Headnote 3(a) of the Tariff Schedules of the United States. The exceptions, valuation procedures and all other provisions of General Headnote 3(a) shall apply to any product deriving from the Marshall Islands or the Federated States of Micronesia.

Section 243

All products of the Marshall Islands or the Federated States of Micronesia imported into the customs territory of the United States which are not accorded the treatment set forth in Section 242 and all products of the United States imported into the Marshall Islands or the Federated States of Micronesia shall receive treatment no less favorable than that accorded like products of any foreign country with respect to customs duties or charges of a similar nature and with respect to laws and regulations relating to importation, exportation, taxation, sale, distribution, storage or use.

Article V

Finance and Taxation

Section 251

The currency of the United States is the official circulating legal tender of the Marshall Islands and the Federated States of Micronesia. Should the Government of the Marshall Islands or the Federated States of Micronesia act to institute another currency, the terms of an appropriate currency transitional period shall be as agreed with the Government of the United States.

Section 252

The Government of the Marshall Islands or the Federated States of Micronesia may, with respect to United States persons, tax income derived from sources within its respective jurisdiction, property situated therein, including transfers of such property by gift or at death, and products consumed therein, in such manner as such Government deems appropriate. The determination of the source of any income, or the situs of any property, shall for purposes of this Compact be made according to the United States Internal Revenue Code.

Section 253

A citizen of the Marshall Islands or the Federated States of Micronesia, domiciled therein, shall be exempt from:

(a) Income taxes imposed by the Government of the United States upon fixed or determinable annual income.

[1821]

(b) Estate, gift, and generation-skipping transfer taxes imposed by the Government of the United States.

Section 254

(a) In determining any income tax imposed by the Government of the Marshall Islands or the Federated States of Micronesia, those Governments shall have authority to impose tax upon income derived by a resident of the Marshall Islands or the Federated States of Micronesia from sources without t[h]e Marshall Islands and the Federated States of Micronesia, in the same manner and to the same extent as those Governments impose tax upon income derived from within their respective jurisdictions. If the Government of the Marshall Islands or the Federated States of Micronesia exercises such authority as provided in this subsection, any individual resident of the Marshall Islands or the Federated States of Micronesia who is subject to tax by the Government of the United States on income which is also taxed by the Government of the Marshall Islands or the Federated States of Micronesia shall be relieved of liability to the Government of the United States for the tax which, but for this subsection, would otherwise be imposed by the Government of the United States on such income. For purposes of this Section, the term "resident of the Marshall Islands or the Federated States of Micronesia" shall be deemed to include any person who was physically present in the Marshall Islands or the Federated States of Micronesia for a period of 183 or more days during any taxable year; provided, that as between the Government of the Marshall Islands and the Federated States of Micronesia, the authority to tax an individual resident of the Marshall Islands or the Federated States of Micronesia in respect of income from sources without the Marshall Islands and the Federated States of Micronesia as provided in this subsection may be exercised only by the Government in whose jurisdiction such individual was physi-

cally present for the greatest number of days during the taxable year.

(b) If the Government of the Marshall Islands or the Federated States of Micronesia subjects income to taxation substantially similar to that imposed by the Trust Territory Code in effect on January 1, 1980, such Government shall be deemed to have exercised the authority described in Section 254(a).

Section 255

Where not otherwise manifestly inconsistent with the intent of this Compact, provisions in the United States Internal Revenue Code that are applicable to possessions of the United States as of January 1, 1980 shall be treated as applying to the Marshall Islands and the Federated States of Micronesia. If such provisions of the Internal Revenue Code are amended, modified or repealed after that date, such provisions shall continue in effect as to the Marshall Islands and the Federated States of Micronesia for a period of two years during which time the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia shall negotiate an agreement which shall provide benefits substantially equivalent to those which obtained under such provisions.

[1822]

TITLE THREE

SECURITY AND DEFENSE RELATIONS

Article I

Authority and Responsibility

Section 311

(a) The Government of the United States has full authority and responsibility for security and defense

matters in or relating to the Marshall Islands and the Federated States of Micronesia.

(b) This authority and responsibility includes:

(1) the obligation to defend the Marshall Islands and the Federated States of Micronesia and their peoples from attack or threats thereof as the United States and its citizens are defended;

(2) the option to foreclose access to or use of the Marshall Islands and the Federated States of Micronesia by military personnel or for the military purposes of any third country; and

(3) the option to establish and use military areas and facilities in the Marshall Islands and the Federated States of Micronesia, subject to the terms of the separate agreements referred to in Sections 321 and 323.

(c) The Government of the United States confirms that it shall act in accordance with the principles of international law and the Charter of the United Nations in the exercise of this authority and responsibility.

Section 312

Subject to the terms of any agreements negotiated in accordance with Sections 321 and 323, the Government of United States may conduct within the lands, waters and airspace of the Marshall Islands and the Federated States of Micronesia the activities and operations necessary for the exercise of its authority and responsibility under this Title.

Section 313

(a) The Governments of the Marshall Islands and the Federated States of Micronesia shall refrain from actions which the Government of the United States de-

termines, after appropriate consultation with those Governments, to be incompatible with its authority and responsibility for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia.

(b) The consultations referred to in this Section shall be conducted expeditiously at senior levels of the Governments concerned, and the subsequent determination by the Government of the United States referred to in this Section shall be made only at senior interagency levels of the Government of the United States.

(c) The Government of the Marshall Islands or the Federated States of Micronesia shall be afforded, on an expeditious basis, an opportunity to raise its concerns with the United States Secretary of State personally and the United States Secretary of Defense personally regarding any determination made in accordance with this Section.

[1823]

Section 314

(a) Unless otherwise agreed, the Government of the United States shall not, in the Marshall Islands or the Federated States of Micronesia:

(1) test by detonation or dispose of any nuclear weapon, nor test, dispose of, or discharge any toxic chemical or biological weapon; or

(2) test, dispose of, or discharge any other radioactive, toxic chemical or biological materials in an amount or manner which would be hazardous to public health or safety.

(b) Unless otherwise agreed, other than for transit or over flight purposes or during time of a national emergency declared by the President of the United States, a state of war declared by the Congress of the United States or as necessary to defend against an actual or impending armed attack on the United States, the Marshall Islands or the Federated States of Micronesia, the Government of the United States shall not store in the Marshall Islands or the Federated States of Micronesia any toxic chemical weapon, nor any radioactive materials nor any toxic chemical materials intended for weapons use.

(c) Radioactive, toxic chemical, or biological materials not intended for weapons use shall not be affected by Section 314(b).

(d) No material or substance referred to in this Section shall be stored in the Marshall Islands or the Federated States of Micronesia except in an amount and manner which would not be hazardous to public health or safety. In determining what shall be an amount or manner which would be hazardous to public health or safety under this Section, the Government of the United States shall comply with any applicable mutual agreement, international guidelines accepted by the Government of the United States, and the laws of the United States and their implementing regulations.

(e) Any exercise of the exemption authority set forth in Section 161(e) shall have no effect on the obligations of the Government of the United States under this Section or on the application of this subsection.

(f) The provisions of this Section shall apply in the areas in which the Government of the Marshall Islands or the Federated States of Micronesia exercises juris-

diction over the living resources of the seabed, subsoil or water column adjacent to its coasts.

Section 315

The Government of the United States may invite members of the armed forces of other countries to use military areas and facilities in the Marshall Islands or the Federated States of Micronesia, in conjunction with and under the control of United States Armed Forces. Use by units of the armed forces of other countries of such military areas and facilities, other than for transit and overflight purposes, shall be subject to consultation with and, in the case of major units, approval by the Government of the Marshall Islands or the Federated States of Micronesia.

Section 316

The authority and responsibility of the Government of the United States under this Title may not be transferred or otherwise assigned.

[1824]

Article II

Defense Facilities and Operating Rights

Section 321

(a) Specific arrangements for the establishment and use by the Government of the United States of military areas and facilities in the Marshall Islands or the Federated States of Micronesia are set forth in separate agreements which shall come into effect simultaneously with this Compact.

(b) If, in the exercise of its authority and responsibility under this Title, the Government of the United States requires the use of areas within the Marshall Is-

lands or the Federated States of Micronesia in addition to those for which specific arrangements are concluded pursuant to Section 321(a), it may request the Government concerned to satisfy those requirements through leases or other arrangements. The Government of the Marshall Islands or the Federated States of Micronesia shall sympathetically consider any such request and shall establish suitable procedures to discuss it with and provide a prompt response to the Government of the United States.

(c) The Government of the United States recognizes and respects the scarcity and special importance of land in the Marshall Islands and the Federated States of Micronesia. In making any requests pursuant to Section 321(b), the Government of the United States shall follow the policy of requesting the minimum area necessary to accomplish the required security and defense purpose, of requesting only the minimum interest in real property necessary to support such purpose, and of requesting first to satisfy its requirement through public real property, where available, rather than through private real property.

Section 322

The Government of the United States shall provide and maintain fixed and floating aids to navigation in the Marshall Islands and the Federated States of Micronesia at least to the extent necessary for the exercise of its authority and responsibility under this Title.

Section 323

The military operating rights of the Government of the United States and the legal status and contractual arrangements of the United States Armed Forces, their members, and associated civilians, while present

in the Marshall Islands or the Federated States of Micronesia, are set forth in separate agreements which shall come into effect simultaneously with this Compact.

Article III

Defense Treaties and International Security Agreements

Section 331

Subject to the terms of this Compact and its related agreements, the Government of the United States, exclusively, shall assume and enjoy, as to the Marshall Islands and the Federated States of Micronesia, all obligations, responsibilities, rights and benefits of:

(a) Any defense treaty or other international security agreement applied by the Government of the United States as Administering [1825] Authority of the Trust Territory of the Pacific Islands as of the day preceding the effective date of this Compact.

(b) Any defense treaty or other international security agreement to which the Government of the United States is or may become a party which it determines to be applicable in the Marshall Islands and the Federated States of Micronesia. Such a determination by the Government of the United States shall be preceded by appropriate consultation with the Government of the Marshall Islands or the Federated States of Micronesia.

Article IV

Service in Armed Forces of the United States

Section 341

Any person entitled to the privileges set forth in Section 141 shall be eligible to volunteer for service in

the Armed Forces of the United States, but shall not be subject to involuntary induction into military service of the United States so long as such person does not establish habitual residence in the United States, its territories or possessions.

Section 342

The Government of the United States shall have enrolled, at any one time, at least two qualified students, one each from the Marshall Islands and the Federated States of Micronesia, as may be nominated by their respective Governments, in each of:

(a) The United States Coast Guard Academy pursuant to 14 U.S.C. 195.

(b) The United States Merchant Marine Academy pursuant to 46 U.S.C. 1295b(b)(6), provided that the provisions of 46 U.S.C. 1295b(b)(6)(C) shall not apply to the enrollment of students pursuant to Section 342(b) of this Compact.

Article V

General Provisions

Section 351

(a) The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia shall establish two Joint Committees empowered to consider disputes under the implementation of this Title and its related agreements.

(b) The membership of each Joint Committee shall comprise selected senior officials of each of the two participating Governments. The senior United States military commander in the Pacific area shall be the senior United States member of each Joint Committee. For the meetings of each Joint Committee, each of the two

participating Governments may designate additional or alternate representatives as appropriate for the subject matter under consideration.

(c) Unless otherwise mutually agreed, each Joint Committee shall meet semi-annually at a time and place to be designated, after appropriate consultation, by the Government of the United States. A Joint Committee also shall meet promptly upon request of either of its members. Upon notification by the Government of the United States, the Joint Committees so notified shall meet promptly in a combined session to consider matters within the jurisdiction of more [1826] than one Joint Committee. Each Joint Committee shall follow such procedures, including the establishment of functional subcommittees, as the members may from time to time agree.

(d) Unresolved issues in each Joint Committee shall be referred to the Governments concerned for resolution, and the Government of the Marshall Islands or the Federated States of Micronesia shall be afforded, on an expeditious basis, an opportunity to raise its concerns with the United States Secretary of Defense personally regarding any unresolved issue which threatens its continued association with the Government of the United States.

Section 352

In the exercise of its authority and responsibility under Title Three, the Government of the United States shall accord due respect to the authority and responsibility of the Governments of the Marshall Islands and the Federated States of Micronesia under Titles One, Two and Four and to their responsibility to assure the well-being of their peoples.

Section 353

(a) The Government of the United States shall not include any of the Governments of the Marshall Islands and the Federated States of Micronesia as named parties to a formal declaration of war, without their respective consent.

(b) Absent such consent, this Compact is without prejudice, on the ground of belligerence or the existence of a state of war, to any claims for damages which are advanced by the citizens, nationals or Government of the Marshall Islands or the Federated States of Micronesia, which arise out of armed conflict subsequent to the effective date of this Compact and which are:

(1) petitions to the Government of the United States for redress; or

(2) claims in any manner against the government, citizens, nationals or entities of any third country.

(c) Petitions under Section 353(b)(1) shall be treated as if they were made by citizens of the United States.

Section 354

(a) Notwithstanding any other provision of this Compact, the provisions of this Title are binding from the effective date of this Compact for a period of fifteen years between the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia and thereafter as mutually agreed or in accordance with Section 231, unless earlier terminated by mutual agreement pursuant to Section 441, or amended pursuant to Article III of Title Four.

(b) The Government of the United States recognizes, in view of the special relationship between the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia, and in view of the existence of separate agreements with each of them pursuant to Sections 321 and 323, that, even if this Title should terminate, any attack on the Marshall Islands or the Federated States of Micronesia during the period in which such separate agreements are in effect, would constitute a threat to the peace and security of the entire region and a danger to the United States. In the event of such an attack, the Government of the United States would take action to meet the danger to the [1827] United States and to the Marshall Islands and the Federated States of Micronesia in accordance with its constitutional processes.

TITLE FOUR

GENERAL PROVISIONS

Article I

Approval and Effective Date

Section 411

This Compact shall come into effect upon mutual agreement between the Government of the United States, acting in fulfillment of its responsibilities as Administering Authority of the Trust Territory of the Pacific Islands, and the Government of the Marshall Islands or the Federated States of Micronesia and subsequent to completion of the following:

(a) Approval by the Government of the Marshall Islands or the Federated States of Micronesia in accordance with its constitutional processes.

(b) Conduct of the plebiscite referred to in Section 412.

(c) Approval by the Government of the United States in accordance with its constitutional processes.

Section 412

A plebiscite shall be conducted in each of the Marshall Islands and the Federated States of Micronesia for the free and voluntary choice by the peoples of the Trust Territory of the Pacific Islands of their future political status through informed and democratic processes. The Marshall Islands and the Federated States of Micronesia shall each be considered a voting jurisdiction, and the plebiscite shall be conducted under fair and equitable standards in each voting jurisdiction. The Administering Authority of the Trust Territory of the Pacific Islands, after consultation with the Governments of the Marshall Islands and the Federated States of Micronesia, shall fix the date on which the plebiscite shall be called in each voting jurisdiction. The plebiscite shall be called jointly by the Administering Authority of the Trust Territory of the Pacific Islands and the other Signatory Government concerned. The results of the plebiscite in each voting jurisdiction shall be determined by a majority of the valid ballots cast in that voting jurisdiction.

Article II

Conference and Dispute Resolution

Section 421

The Government of the United States shall confer promptly at the request of the Government of the Marshall Islands or the Federated States of Micronesia and any of those Governments shall confer promptly at the request of the Government of the United States on

matters relating to the provisions of this Compact or of its related agreements.

[1828]

Section 422

In the event the Government of the United States, or the Government of the Marshall Islands or the Federated States of Micronesia, after conferring pursuant to Section 421, determines that there is a dispute and gives written notice thereof, the Governments which are parties to the dispute shall make a good faith effort to resolve the dispute among themselves.

Section 423

If a dispute between the Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia cannot be resolved within 90 days of written notification in the manner provided in Section 422, either party to the dispute may refer it to arbitration in accordance with Section 424.

Section 424

Should a dispute be referred to arbitration as provided for in Section 423, an Arbitration Board shall be established for the purpose of hearing the dispute and rendering a decision which shall be binding upon the two parties to the dispute unless the two parties mutually agree that the decision shall be advisory. Arbitration shall occur according to the following terms:

(a) An Arbitration Board shall consist of a Chairman and two other members, each of whom shall be a citizen of a party to the dispute. Each of the two Governments which is a party to the dispute shall appoint one member to the Arbitration Board. If either party to the dispute does not fulfill the appointment require-

ments of this Section within 30 days of referral of the dispute to arbitration pursuant to Section 423, its member on the Arbitration Board shall be selected from its own standing list by the other party to the dispute. Each Government shall maintain a standing list of 10 candidates. The parties to the dispute shall jointly appoint a Chairman within 15 days after selection of the other members of the Arbitration Board. Failing agreement on a Chairman, the Chairman shall be chosen by lot from the standing lists of the parties to the dispute within 5 days after such failure.

(b) The Arbitration Board shall have jurisdiction to hear and render its final determination on all disputes arising exclusively under Articles I, II, III, IV and V of Title One, Title Two, Title Four and their related agreements.

(c) Each member of the Arbitration Board shall have one vote. Each decision of the Arbitration Board shall be reached by majority vote.

(d) In determining any legal issue, the Arbitration Board may have reference to international law and, in such reference, shall apply as guidelines the provisions set forth in Article 38 of the Statute of the International Court of Justice.

(e) The Arbitration Board shall adopt such rules for its proceedings as it may deem appropriate and necessary, but such rules shall not contravene the provisions of this Compact. Unless the parties provide otherwise by mutual agreement, the Arbitration Board shall endeavor to render its decision within 30 days after the conclusion of arguments. The Arbitration Board shall make findings of fact and conclusions of law and its members may issue dissenting or individual opinions. Except as may be otherwise decided by the Arbitration

Board, one-half of all costs of the arbitration shall be borne by the Government of the United States and the remainder shall be borne by the other party to the dispute.

[1829]

Article III

Amendment

Section 431

The provisions of this Compact may be amended as to the Governments of the Marshall Islands and the Federated States of Micronesia and as to the Government of the United States at any time by mutual agreement.

Section 432

The provisions of this Compact may be amended as to any one of the Governments of the Marshall Islands or the Federated States of Micronesia and as to the Government of the United States at any time by mutual agreement. The effect of any amendment made pursuant to this Section shall be restricted to the relationship between the Governments agreeing to such amendment, but the other Governments signatory to this Compact shall be notified promptly by the Government of the United States of any such amendment.

Article IV

Termination

Section 441

This Compact may be terminated as to any one of the Governments of the Marshall Islands or the Federated States of Micronesia and as to the Government of

the United States by mutual agreement and subject to Section 451.

Section 442

This Compact may be terminated by the Government of the United States as to the Government of the Marshall Islands or the Federated States of Micronesia subject to Section 452, such termination to be effective on the date specified in the notice of termination by the Government of the United States but not earlier than six months following delivery of such notice. The time specified in the notice of termination may be extended.

Section 443

This Compact shall be terminated, pursuant to their respective constitutional processes, by the Government of the Marshall Islands or the Federated States of Micronesia subject to Section 453 if the people represented by such Government vote in a plebiscite to terminate. Such Government shall notify the Government of the United States of its intention to call such a plebiscite which shall take place not earlier than three months after delivery of such notice. The plebiscite shall be administered by such Government in accordance with its constitutional and legislative processes, but the Government of the United States may send its own observers and invite observers from a mutually agreed party. If a majority of the valid ballots cast in the plebiscite favors termination, such Government shall, upon certification of the results of the plebiscite, give notice of termination to the Government of the United States, such termination to be effective on the date specified in such notice but not earlier than three months following the date of delivery of such notice. The time specified in the notice of termination may be extended.

[1830]

Article V

Survivability

Section 451

Should termination occur pursuant to Section 441, economic assistance by the Government of the United States shall continue on mutually agreed terms.

Section 452

(a) Should termination occur pursuant to Section 442, the following provisions of this Compact shall remain in full force and effect until the fifteenth anniversary of the effective date of this Compact between the Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia and thereafter as mutually agreed:

(1) Article VI and Sections 172, 173, 176 and 177 of Title One;

(2) Article I and Section 233 of Title Two;

(3) Title Three; and

(4) Articles II, III, V and VI of Title Four.

(b) The Government of the United States shall also provide the Government as to which termination occurs pursuant to Section 442 with either the programs or services provided pursuant to Article II of Title Two as the time of termination, or their equivalent, as determined by the Government of the United States. Such assistance shall continue until the fifteenth anniversary of the effective date of this Compact, and thereafter as mutually agreed.

Section 453

(a) Should termination occur pursuant to Section 443, the following provisions of this Compact shall remain in full force and effect until the fifteenth anniversary of the effective date of this Compact between the Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia and thereafter as mutually agreed:

(1) Article VI and Sections 172, 173, 176 and 177 of Title One;

(2) Title Three; and

(3) Articles II, III, V and VI of Title Four.

(b) Upon receipt of notice of termination pursuant to Section 443, the Government of the United States and the Government so terminating shall promptly consult with regard to their future relationship. These consultations shall determine the level of economic assistance which the Government of the United States shall provide to the Government so terminating for the period ending on the fifteenth anniversary of the effective date of this Compact provided that the annual amounts specified in Sections 211, 212, 214, 215 and 216 shall continue without diminution. Such amounts, with the exception of those specified in Section 216, shall be adjusted according to the formula set forth in Section 217.

Section 454

Notwithstanding any other provision of this Compact:

(a) The Government of the United States reaffirms its continuing interest in promoting the long-term economic advancement and self-sufficiency of the peoples

of the Marshall Islands and the Federated States of Micronesia.

[1831]

(b) The separate agreements referred to in Article II of the Title Three shall remain in effect in accordance with their terms which shall also determine the duration of Section 213.

Article VI

Definition of Terms

Section 461

For the purpose of this Compact only and without prejudice to the views of the Government of the United States or the Government of the Marshall Islands or the Federated States of Micronesia as to the nature and extent of the jurisdiction under international law of any of them, the following terms shall have the following meanings:

(a) "Trust Territory of the Pacific Islands" means the area established in the Trusteeship Agreement consisting of the administrative districts of Kosrae, Yap, Ponape, the Marshall Islands and Truk as described in Title One, Trust Territory Code, Section 1, in force on January 1, 1979. This term does not include the area of Palau or the Northern Mariana Islands.

(b) "Trusteeship Agreement" means the agreement setting forth the terms of trusteeship for the Trust Territory of the Pacific Islands, approved by the Security Council of the United Nations April 2, 1947, and by the United States July 18, 1947, entered into force July 18, 1947, 61 Stat. 3301, T.I.A.S. 1665, 8 U.N.T.S. 189.

(c) "The Marshall Islands" and "the Federated States of Micronesia" are used in a geographic sense

and include the land and water areas to the outer limits of the territorial sea and the air space above such areas as now or hereafter recognized by the Government of the United States.

(d) "Government of the Marshall Islands" means the Government established and organized by the Constitution of the Marshall Islands including all the political subdivisions and entities comprising that Government.

"Government of the Federated States of Micronesia" means the Government established and organized by the Constitution of the Federated States of Micronesia including all the political subdivisions and entities comprising that Government.

(e) The following terms shall be defined consistent with the 1976 Edition of the Radio Regulations of the International Telecommunications Union (ISBN 92-61-0081-5) as follows:

(1) "Radio Communications" means telecommunication by means of radio waves.

(2) "Station" means one or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment, necessary at one location for carrying on a radio communication service; each station shall be classified by the service in which it operates permanently or temporarily.

(3) "Broadcasting Service" means a radio communication service in which the transmissions are intended for direct reception by the general public, and which may include sound transmissions, television transmissions or other types of transmissions.

(4) "Broadcasting Station" means a station in the broadcasting service.

[1832]

(f) "Frequency Assignment" means the same as "Frequency Assignment" means in the 1976 Edition of the Radio Regulations of the International Telecommunications Union (ISBN 92-61-0081-5).

(g) "Habitual Residence" means a place of general abode or a principal, actual dwelling place of a continuing or lasting nature; provided, however, that t[h]is term shall not apply to the residence of any person who entered the United States for the purpose of full-time studies as long as such person maintains that status, or who has been physically present in the United States, the Marshall Islands, or the Federated States of Micronesia for less than one year, or who is a dependent of a resident representative, as described in Section 152.

(h) For the purposes of Article IV of the Title One of this Compact:

(1) "Actual Residence" means physical presence in the Marshall Islands or the Federated States of Micronesia during eighty-five percent of the period of residency required by Section 141(a)(3); and

(2) "Certificate of Actual Residence" means a certificate[e] issued to a naturalized citizen by the Government which has naturalized him stating that the citizen has complied with the actual residence requirement of Section 141(a)(3).

(i) "Military Areas and Facilities" means those areas and facilities in the Marshall Islands or the Federated States of Micronesia reserved or acquired by the Government of the Marshall Islands or the Federated

States of Micronesia for use by the Government of the United States, as set forth in the separate agreements referred to in Section 321.

(j) "Capital Account" means, for each year of the Compact, those portions of the tota[l] grant assistance provided in Article I of Title Two, adjusted by Section 217, which are to be obligated for:

(1) the construction or major repair of capital infrastructure; or

(2) public and private sector projects identified in the official overall economic development plan.

(k) "Current Account" means, for each year of the Compact, those portions of the total grant assistance provided in Article I of Title Two, adjusted by Section 217, which are to be obligated for recurring operational activities inc[l]uding infrastructure maintenance as identified in the annual budget justifications submitted yearly to the Government of the United States.

(l) "Official Overall Economic Development Plan" means the documented program of annual development which identifies the specific p[o]licy and project activities necessary to achieve a specified set of economic goals and objectives during the period of free association, consistent with the economic assistance authority in Title Two. Such a document should include an analysis of population trends, manpower requirements, social needs, gross national product estimates, resource utilization, infrastructure needs and expenditures, and the specific private sector projects required to develop the local economy of the Marshall Islands or the Federated States of Micronesia. Project identification should include initial cost estimates, with project purposes related to specific development goals and objectives.

(m) "Tariff Schedules of the United States" means the Tariff Schedules of the United States as amended from time to time and as promulgated pursuant to United States law and includes the Tariff Schedules of the United States Annotated (TSUSA), as amended.

[1833]

(n) "Vienna Convention on Diplomatic Relations" means the Vienna Convention on Diplomatic Relations, done April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95.

Section 462

The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia, as appropriate, shall conclude related agreements which shall come into effect and shall survive in accordance with their terms, as follows:

(a) Agreement Regarding the Provision of Telecommunication Services by the Government of the United States to the Marshall Islands and the Federated States of Micronesia Concluded Pursuant to Section 131 of the Compact of Free Association;

(b) Agreement Regarding the Operation of Telecommunication Services of the Government of the United States in the Marshall Islands and the Federated States of Micronesia Concluded Pursuant to Section 132 of the Compact of Free Association.

(c) Agreement on Extradition, Mutual Assistance in Law Enforcement Matters and Penal Sanctions Concluded Pursuant to Section 175 of the Compact of Free Association;

(d) Agreement Between the Government of the United States and the Government of the Marshall Is-

lands for the Implementation of Section 177 of the Compact of Free Association;

(e) Federal Programs and Services Agreement Concluded Pursuant to Article II of Title Two and Section 232 of the Compact of Free Association;

(f) Agreement Concluded Pursuant to Section 234 of the Compact of Free Association;

(g) Agreement Regarding the Military Use and Operating Rights of the Government of the United States in the Marshall Islands Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association;

(h) Agreement Regarding the Military Use and Operating Rights of the Government of the United States in the Federated States of Micronesia Concluded Pursuant to Sections 227, 321 and 323 of the Compact of Free Association;

(i) Status of Forces Agreement Concluded Pursuant to Section 323 of the Compact of Free Association;

(j) Agreement Between the Government of the United States and the Government of the Federated States of Micronesia Regarding Friendship, Cooperation and Mutual Security Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association; and

(k) Agreement Between the Government of the United States and the Government of the Marshall Islands Regarding Mutual Security Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association.

Section 463

(a) Except as set forth in Section 463(b), any reference in this Compact to a provision of the United States

Code or the Statutes at Large of the United States constitutes the incorporation of the language of such provision into this Compact, as such provision was in force on January 1, 1980.

(b) Any reference in Article VI of Title One and Sections 131, 174, 175, 178 and 342 to a provision of the United States Code or the Statutes at Large of the United States or to the Privacy Act, the Freedom of Information Act or the Administrative Procedure Act [1834] constitutes the incorporation of the language of such provision into this Compact as such provision is in force on the effective date of this Compact or as it may be amended thereafter on a non-discriminatory basis according to the constitutional processes of the United States

Article VII

Concluding Provisions

Section 471

(a) The Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia agree that they have full authority under their respective Constitutions to enter into this Compact and its related agreements and to fulfill all of their respective responsibilities in accordance with the terms of this Compact and its related agreements. The Governments pledge that they are so committed.

(b) Each of the Governments of the United States, the Marshall Islands and the Federated States of Micronesia shall take all necessary steps, of a general or particular character, to ensure, not later than the effective date of this Compact, the conformity of its laws,

regulations and administrative procedures with the provisions of this Compact.

(c) Without prejudice to the effects of this Compact under international law, this Compact has the force and effect of a statute under the laws of the United States.

Section 472

This Compact may be accepted, by signature or otherwise, by the Government of the United States, the Government of the Marshall Islands, and the Government of the Federated States of Micronesia. Each Government accepting this Compact shall possess an original English language version.

IN WITNESS WHEREOF, the undersigned, duly authorized, have signed this Compact of Free Association which shall come into effect in accordance with its terms between the Government of the United States and each of the other Governments signatory to this Compact.

DONE AT HONOLULU, HAWAII, THIS 1ST DAY OF OCTOBER, ONE THOUSAND, NINE HUNDRED EIGHTY-TWO

FOR THE GOVERNMENT

OF

THE UNITED STATES OF AMERICA

AMBASSADOR FRED M. ZEDER, II
PRESIDENT'S PERSONAL REPRESENTATIVE
FOR MICRONESIAN STATUS NEGOTIATIONS

[1835]

DONE AT HONOLULU, HAWAII, THIS 1ST DAY OF OCTOBER, ONE THOUSAND, NINE HUNDRED EIGHTY-TWO

FOR THE GOVERNMENT

OF

THE FEDERATED STATES OF MICRONESIA

HONORABLE ANDON L. AMARAICH
CHAIRMAN, COMMISSION ON FUTURE
POLITICAL STATUS AND TRANSITION

DONE AT MAJURO, MARSHALL ISLANDS, THIS 25TH DAY

OF JUNE, ONE THOUSAND, NINE HUNDRED, EIGHTY-THREE

FOR THE GOVERNMENT

OF

THE UNITED STATES OF AMERICA

AMBASSADOR FRED M. ZEDER, II
PRESIDENT'S PERSONAL REPRESENTATIVE
FOR MICRONESIAN STATUS NEGOTIATIONS

DONE AT MAJURO, MARSHALL ISLANDS, THIS 25TH DAY

OF JUNE, ONE THOUSAND, NINE HUNDRED EIGHTY-THREE

FOR THE GOVERNMENT

OF

THE MARSHALL ISLANDS

PRESIDENT AMATA KABUA
PRESIDENT OF THE REPUBLIC
OF THE MARSHALL ISLANDS

SEC. 202. JURISDICTION.

(a) With respect to section 321 of the Compact of Free Association and its related agreements, the jurisdictional provisions set forth in subsection (b) of this section shall apply only to the citizens and nationals of

the United States and aliens lawfully admitted to the United States for permanent residence who are in the Marshall Islands or the Federated States of Micronesia.

(b)(1) The defense sites of the United States established in the Marshall Islands or the Federated States of Micronesia in accordance with the Compact of Free Association and its related agreements are within the special maritime and territorial jurisdiction of the United States as set forth in section 7, title 18, United States Code.

(2) Any person referred to in subsection (a) of this section who within or upon such defense sites is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State of Hawaii by the laws thereof, in force at [1836] the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(3) The United States District Court for the District of Hawaii shall have jurisdiction to try all criminal offenses against the United States, including the laws of the State of Hawaii made applicable to the defense sites in the Marshall Islands or the Federated States of Micronesia by virtue of paragraph (2) of this subsection, committed by any person referred to in subsection (a) of this section.

(4) The United States District Court for the District of Hawaii may appoint one or more magistrates for the defense sites in the Marshall Islands. Such Magistrates shall have the power and the status of Magistrates appointed pursuant to chapter 43, title 28, United States Code, provided, however that such Magistrates shall have the power to try persons accused of and sentence persons convicted of petty offenses, as de-

fined in section 1(3), title 18, United States Code, including violations of regulations for the maintenance of peace, order, and health issued by the Commanding Officer on such defense sites, without being subject to the restrictions provided for in section 3401(b), title 18, United States Code.

TITLE III—PACIFIC POLICY REPORTS

SEC. 301. FINDINGS.

The Congress finds that—

(1) the United States does not have a clearly defined policy for United States noncontiguous Pacific areas (including the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the State of Hawaii, and the State of Alaska) and for United States-associated noncontiguous Pacific areas (including the Federated States of Micronesia, the Marshall Islands, and Palau);

(2) the Federal Government has often failed to consider the implications for, effects on, and potential of noncontiguous Pacific areas in the formulation and conduct of foreign and domestic policy, to the detriment of both the attainment of the objectives of Federal policy and noncontiguous Pacific areas;

(3) policies and programs designed for the United States as a whole may impose inappropriate standards on noncontiguous Pacific areas because of their unique circumstances and needs; and

(4) the present Federal organizational arrangements for liaison with (and providing assistance to) the insular areas may not be adequate—

(A) to coordinate the delivery of Federal programs and services to noncontiguous Pacific areas;

(B) to provide a consistent basis for administration of programs;

(C) to adapt policy to the special requirements of each area and modify the application of Federal programs, laws, and regulations accordingly;

(D) to be responsive to the Congress in the discharge of its responsibilities; and

(E) to attain the international obligations of the United States.

SEC. 302. REPORTS.

(a) SUBMISSION.—Not later than one year after the date of the enactment of this joint resolution and each five years thereafter, the Secretary of the Interior, in consultation with the Secretary of State, shall su[b]mit to the Congress and the President a report on United States noncontiguous Pacific areas policy together with such recommendations as may be necessary to accomplish the objectives of such policy.

(b) CONTENTS.—The reports required in subsection (a) of this section shall set forth clearly defined policies regarding United States, and United States associated, noncontiguous Pacific areas, including—

(1) the role of and impacts on the noncontiguous Pacific areas in the formulation and conduct of foreign policy;

(2) the applicability of standards contained in Federal laws, regulations, and programs to the noncontiguous Pacific areas and any modifications

which may be necessary to achieve the intent of such laws, regulations, and programs consistent with the unique character of the noncontiguous Pacific areas;

(3) the effectiveness of the Federal executive organizational arrangements for—

(A) providing liaison between the Federal Government and the governments of the noncontiguous Pacific areas;

(B) coordinating Federal actions in a manner which recognizes the unique circumstances and needs of the non-contiguous Pacific areas; and

(C) achieving the objective of Federal policy and ensuring that the Congress receives the information necessary to discharge its responsibilities; and

(4) actions which may be needed to facilitate the economic and social health and development of the noncontiguous Pacific areas, consistent with their self-determined objectives.

SEC. 303. CONFERENCE.

(a) MEETING.—Prior to submitting the reports required under section 302(b), the Secretary of the Interior, in consultation with the Secretary of State, shall convene a conference to obtain the views of the noncontiguous Pacific areas on the matters required to be addressed in such reports.

(b) PARTICIPANTS.—Representatives of each of the noncontiguous Pacific areas; and the heads of all executive departments and agencies, and other public and private organizations concerned with the noncon-

tiguous Pacific areas as requested by the Secretary of the Interior shall be entitled to be participants in the conference.

(c) WRITTEN COMMENTS.—The Secretary of the Interior shall afford participants in the conference an opportunity to submit written comments for inclusion in the reports required under section 302.

SEC. 304. ADMINISTRATIVE MATTERS.

(a) ADMINISTRATIVE SUPPORT.—The Secretary of the Interior shall provide all necessary administrative sup-port to accomplish the requirements of section 302 and 303.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

[1838]

TITLE IV—CLARIFICATION OF CERTAIN TRADE AND TAX PROVISIONS OF THE COMPACT

SEC. 401. FREELY ASSOCIATED STATES TARIFF TREATMENT.

(a) SECTION 242.—Section 242 of the Compact shall be construed and applied as if it read as follows:

"Section 242

"The President shall proclaim the following tariff treatment for articles imported from the Federated States of Micronesia or the Marshall Islands which shall apply during the period of effectiveness of this title:

"(1) Unless otherwise excluded, articles imported from the Federated States of Micronesia or

the Marshall Islands, subject to the limitations imposed under sections 503(b) and 504(c) of title 5 of the Trade Act of 1974 (19 U.S.C. 2463(b); 2464(c)), shall be exempt from duty.

"(2) Only canned tuna provided for in item 112.30 of the Tariff Schedules of the United States that is imported from the Federated States of Micronesia and the Marshall Islands during any calendar year not to exceed 10 percent of the United States consumption of canned tuna during the immediately preceding calendar year, as re-ported by the National Marine Fisheries Service, shall be exempt from duty; but the quantity of tuna given duty free treatment under this paragraph for any calendar year shall be counted against the aggregate quantity of canned tuna that is dutiable under rate column numbered 1 of such item 112.30 for that calendar year.

"(3) The duty-free treatment provided under paragraph (1) shall not apply to—

"(A) watches, clocks, and timing apparatus provided for in subpart E of part 2 of schedule 7 of the Tariff Schedules of the United States;

"(B) buttons (whether finished or not finished) provided for in item 745.32 of such Schedules;

"(C) textile and apparel articles which are subject to textile agreements; and

"(D) footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel which were not eligible articles for purposes of chapter V of the Trade Act of 1974 (19 U.S.C. 2461, et seq.) on April 1, 1984.

"(4) If the cost or value of materials produced in the customs territory of the United States is included with respect to an eligible article which is a product of the Federated States of Micronesia or the Marshall Islands, an amount not to exceed 15 percent of the appraised value of the article at the time it is entered that is attributable to such United States cost or value may be applied for duty assessment purposes toward determining the percentage referred to in section 503(b)(2) of title V of the Trade Act of 1974."

(b) SECTION 243.—Section 243 of the Compact shall be construed and applied as if it read as follows:

"Section 243

"Articles imported from the Federated States of Micronesia or the Marshall Islands which are not exempt from duty under paragraphs (1), (2), (3), and (4) of section 242 shall be subject to the rates of duty set forth in column numbered 1 of the Tariff Schedules of the United States and all products of the United States imported into the Federated States of Micronesia or the Marshall Islands shall receive treatment no less favorable than that accorded liked products of any foreign country with respect to customs duties or charges of a similar nature and with respect to laws and regulations relating to importation, exportation, taxation, sale, distribution, storage, or use.".

SEC. 402. CONSTRUCTION OF SECTION 253 OF THE COMPACT.

(a) Subsection (a) of section 253 of the Compact shall not apply.

(b) Subsection (b) of section 253 of the Compact shall apply only to individuals who are nonresidents and not citizens of the United States.

SEC. 403. CONSTRUCTION OF SECTION 254 OF THE COMPACT.

The relief from liability referred to in the second sentence of section 254(a) of the Compact means only—

(1) relief in the form of the foreign tax credit (or deduction in lieu thereof) available with respect to the income taxes of a possession of the United States, and

(2) relief in the form of the exclusion under section 911 of the Internal Revenue Code of 1954.

SEC. 404. CONSTRUCTION OF SECTION 255 OF THE COMPACT.

Section 255 of the Compact shall be construed and applied as if it read as follows:

"Section 255

"(a) EXTENSION OF SECTION 936 TO THE MARSHALL ISLANDS AND THE FEDERATED STATES OF MICRONESIA.—For purposes of section 936 of the Internal Revenue Code of 1954, the Marshall Islands and the Federated States of Micronesia shall be treated as if they were possessions of the United States.

"(b) EXCHANGE OF INFORMATION.—Subsection (a) shall not apply to the Marshall Islands and the Federated States of Micronesia (as the case may be) for any period after December 31, 1986, during which there is not in effect between the appropriate government and the United States an exchange of information agreement of the kind described in section 274(h)(6)(C)

(other than clause (ii) thereof) of the Internal Revenue Code of 1954.

"(c) PROCEDURE IF SECTION 936 INCENTIVE REDUCED.—If the tax incentives extended to the Marshall Islands and the Federated States of Micronesia under subsection (a) are, at any time during which the Compact is in effect, reduced, the Secretary of the Treasury shall negotiate an agreement with the Marshall Islands and the Federated States of Micronesia under which, when such agreement is approved by law, they will be provided with benefits substantially equivalent to such reduction in benefits. If, within the 1 year period after the date of the enactment of the Act making the reduction in benefits, an agreement negotiated under the preceding sentence is not approved by law, the matter shall be submitted to the Arbitration Board established pursuant to section 424 of the Compact. For purposes of Article V of Title Two of the Compact, the Secretary of the Treasury or his delegate shall be the member of such Board representing the Government of the United States. Any decision of such Board in the matter when approved by law shall be binding on the United States, except that such decision rendered is binding only as to whether the United States has provided the substantially equivalent benefits referred to in this subsection.".

[1840]

SEC. 405. THE MARSHALL ISLANDS AND THE FEDERATED STATES OF MICRONESIA TREATED AS NORTH AMERICAN AREA.

For purposes of section 274(h)(3)(A) of the Internal Revenue Code of 1954, the term "North American Area" shall include the Marshall Islands and the Federated States of Micronesia.

SEC. 406. EFFECTIVE DATE.

This title shall apply to income earned, and transactions occurring, after September 30, 1985, in taxable years ending after such date.

SEC. 407. STUDY OF TAX PROVISIONS.

The Secretary of the Treasury or his delegate—

(1) shall conduct a study of the effects of the tax provisions of the Compact (as clarified by the foregoing provisions of this title), and

(2) shall report the results of such study before October 1, 1987, to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate.

SEC. 408. COORDINATION WITH OTHER PROVISIONS.

Nothing in any provision of this joint resolution (other than this title) which is inconsistent with any provision of this title shall have any force or effect.

TITLE V—COMPACT OF FREE ASSOCIATION WITH PALAU

SEC. 501. APPROVAL IN PRINCIPLE.

(a) Subject to subsection (b) of this section, Congress expresses its approval in principle of the Compact of Free Association Between the Government of the United States of America and the Government of the Republic of Palau, the text of which was printed in the Congressional Record of November 14, 1985 on pages S15622 through S15628, inclusive, and which is also printed as Committee Print No. 4 of the Committee on Interior and Insular Affairs of the House of Representatives of the 99th Congress.

(b) A Compact with Palau after it is transmitted to Congress by the President shall take effect only upon—

(1) a certification by the President to the Congress that the Republic of Palau has approved a Compact in accordance with section 411 of the Compact described in subsection (a) and that the President has determined that the United States will be able to carry out fully its rights and responsibilities under Title Three of the Compact described in subsection (a) and the subsidiary agreements thereto; and

(2) enactment by the Congress of a joint resolution approving a compact and providing for its implementation.

SEC. 502. MODIFICATIONS OF COMPACT.

Title IV and Sections 105(b), 105(c), 105(h)(1), 105(l), and 202 of this joint resolution shall apply to a compact with Palau, except that any reference in such sections to the Compact shall be treated as referring to the Compact described in section 501 of this joint [1841] resolution, and any reference in such Title and sections to the Federated States of Micronesia or the Marshall Islands shall be treated as referring to the Republic of Palau. For purposes of applying section 242(2) of the Compact, the annual 10 percent limitation on duty-free imports of canned tuna applies to imports from the Federated States of Micronesia, the Marshall Islands, and the Republic of Palau.

Approved January 14, 1986.

LEGISLATIVE HISTORY—H.J. Res. 187 (S.J. Res. 77):

HOUSE REPORTS: No. 99-188, Pt. I (Comm. on Foreign Affairs), Pt. II (Comm. on Interior and Insular Affairs), Pt. III (Comm. on Merchant Marine and Fisheries), and Pt. IV (Comm. on Ways and Means).

SENATE REPORT No. 99-16, accompanying S.J. Res. 77 (Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD, Vol. 131 (1985):

July 25, considered and passed House.

Oct. 2, Nov. 14, S.J. Res. 77, considered in Senate.

Nov. 14, H.J. Res. 187, considered and passed Senate, amended, in lieu of S.J. Res. 77.

Dec. 11, House agreed to Senate amendments with amendment.

Dec. 13, Senate concurred in House amendment.

APPENDIX E

Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association

PREAMBLE

The Government of the United States and the Government of the Marshall Islands:

In recognition of the enduring friendship between the United States of America and the Republic of the Marshall Islands;

In reaffirmation of the compact of Free Association (the Compact) between the Government of the United States and the Government of the Marshall Islands;

In fulfillment of the provisions of Section 177 of the Compact relating to the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958 (the Nuclear Testing Program);

In recognition of the authority and responsibility of the Government of the Marshall Islands to provide medical and health care to all of the people of the Marshall Islands; and the expressed desire of the Government of the Marshall Islands to include in its integrated, comprehensive and universal medical health-care system, the health-care and surveillance programs and radiological monitoring activities contemplated in United States Public Law 95-134 and United States Public Law 96-205;

In recognition of the authority and responsibility of the Government of the Marshall Islands to provide for the welfare of all the people of the Marshall Islands; and

the expressed desire of the Government of the Marshall Islands to create and maintain, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program, including the resolution of resultant claims; and

In recognition of contributions and sacrifices made by the people of the Marshall Islands in regard to the Nuclear Testing Program;

NOW THEREFORE AGREE:

Article I

The Fund

Section 1—Creation

In fulfillment of its obligations under Section 177 of the Compact, the Government of the United States shall provide to the Government of the Marshall Islands, on the effective date of this Agreement, the sum of $150 million to create a fund (the Fund).

Section 2—Management

In furtherance of the desire of the Government of the Marshall Islands to provide, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program:

(a) The Government of the Marshall Islands shall cause the Fund to be invested with the performance goal of producing for each year of the existence of the Fund average annual proceeds of at least $18 million (Annual Proceeds) for disbursement in accordance with this Agreement.

(b) The Government of the Marshall Islands, in order to achieve the performance goal of the Fund, shall retain as trustee and manager of the Fund (Fund Man-

ager) an United States investment management company which has demonstrated substantial experience in the administration of trusts and which has funds under management in excess of $1 billion. The Fund Manager shall make disbursements in accordance with the provisions of this Agreement to the designated recipients in the name of "The Republic of the Marshall Islands Nuclear Claims Fund".

(c) The Fund shall be invested in bonds, notes and other instruments of investment grade and of United States nationality, including both debt and equity issues, common or preferred stocks, money market funds, certificates of indebtedness and mutual funds. The Government of the United States shall impose no transaction fee or intermediary charge on the investment of the Fund in instruments of the Government of the United States.

(d) Except as may be otherwise required by this Agreement and to achieve its desire to provide a perpetual means of addressing the special needs and unique circumstances of the people of the Marshall Islands resulting from the Nuclear Testing Program, the Government of the Marshall Islands shall not permit nor shall the Fund Manager make disbursements from the Fund.

(e) For purposes of taxation only, the trust into which the Fund is placed pursuant to this Article shall be deemed to be a charitable trust under the laws of the United States and the Republic of the Marshall Islands.

Article II

Distribution of Annual Proceeds

The Fund Manager shall disburse Annual Proceeds in accordance with Article III of this Agreement and as follows:

Section 1—Health, Food, Agricultural Maintenance and Radiological Surveillance

(a) $30 million to the Government of the Marshall Islands, to be disbursed in annual amounts of $2 million for the 15-year period commencing one calendar quarter after the effective date of this Agreement. The Government of the Marshall Islands shall use these sums to obtain technical assistance, on a reimbursable basis, from the United States Public Health Service and other agencies of the Government of the United States. The Government of the United States shall provide such technical assistance including United States contractor services to assist the Government of the Marshall Islands to include, in its health-care system, health-care programs and services related to consequences of the Nuclear Testing Program and contemplated in United States Public Law 95-134 and United States Public Law 96-205. Such technical assistance shall be obtained in accordance with Section 226 of the Compact, the provisions of the Federal Programs and Services Agreement and such separate implementing agreements as may from time to time be concluded. Such technical assistance shall, at the request of the Government of the Marshall Islands, include a whole body counter and the training of its operator. The whole body counter shall be located in a suitable facility chosen and supplied by the Government of the Marshall Islands. The Technical assistance provided for in this subsection may include professional personnel services and dosimetry and bioassay services.

(b) Annual disbursements specified in this Section are in addition to the funds referred to in Section 211(a)(3), 216(a)(2) and 211(b) of the Compact, which may also be expended by the Government of the Marshall Islands to provide its citizens with health-care programs and ser-

vices elated (*sic*) to consequences of the Nuclear Testing Program.

(c) The Government of the Marshall Islands may dedicate any part of the annual disbursements specified in this Section to the financing, including matching financing, of other related health-care and research programs and services of the Government of the United States which are otherwise available to the Government of the Marshall Islands.

(d) At the request of the Government of the Marshall Islands, the Government of the United States shall provide technical assistance, programs and services, on a reimbursable basis, to continue the planting and agriculture maintenance program on Enewetak and to continue the food programs of the Bikini people and Enewetak people for as long as such technical assistance, programs and services may be required. Such technical assistance, programs and services shall be obtained in accordance with Section 226 of the Compact, the provisions of the Federal Programs and Services Agreement and such separate implementing agreements as may from time to time be concluded.

(e) $3 million to the Government of the Marshall Islands for the purpose of the conducting medical surveillance and radiological monitoring activities, to be disbursed in average annual amounts of $1 million for the three-year period commencing on the effective date of this Agreement. The results of such medical surveillance and radiological monitoring activities shall be filed with the Claims Tribunal referred to in Article IV of this Agreement.

Section 2—People of Bikini

$75 million to the Bikini Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of Bikini to be disbursed in quarterly amounts of $1.25 million for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Bikini Distribution Authority may determine consistent with this Agreement.

Section 3—People of Enewetak

$48.75 million to the Enewetak Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of Enewetak, to be disbursed in quarterly amounts of $812,500 for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Enewetak Distribution Authority may determine consistent with this Agreement.

Section 4—People of Rongelap

$37.5 million to the Rongelap Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of Rongelap, to be disbursed in quarterly amounts of $625,000 for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Rongelap Distribution Authority may determine consistent with this Agreement.

Section 5—People of Utrik

$22.5 million to the Utrik Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of Utrik, to be disbursed in quarterly amounts of $375,000 for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Utrik Distribution Authority may determine consistent with this Agreement.

Section 6—Claims Adjudication Funds

(a) $500,000 to the Government of the Marshall Islands to provide for the establishment of the Claims Tribunal, to be disbursed prior to the first anniversary of the effective date of this Agreement.

(b) $500,000 annually to the Claims Tribunal during the term of its existence for its operation, to be disbursed in quarterly amounts of $125,000 commencing one calendar quarter after the first anniversary of the effective date of this Agreement.

(c) $45.75 million to be made available to the Claims Tribunal as necessary for whole or partial payment of monetary awards made by the Claims Tribunal pursuant to Article IV of this Agreement, to be disbursed in annual amounts of up to $2.25 million for the 3-year period commencing on the effective date of this Agreement, and in annual amounts of up to $3.25 million for the 12-year period commencing on the third anniversary of the effective date of this Agreement.

Section 7—Other Disbursements

(a) In the event that Annual Proceeds are not sufficient to meet the disbursement schedules set forth in

Sections 1 through 6 of this Article, disbursements shall be made from the Fund on an annual basis to supplement Annual Proceeds in the amount of the difference.

(b) All monetary awards made by the Claims Tribunal pursuant to Article IV of this Agreement shall be paid on an annual pro-rata basis from available funds until all such awards are paid in full. If, in any year, the annual amount made available pursuant to subsection 6(c) of this Article is not exhausted, the amount not required for that year shall remain in the Fund and shall be made available for disbursement in payment of monetary awards made by the Claims Tribunal in subsequent years.

(c) Commencing on the fifteenth anniversary of the effective date of this Agreement, not less than 75 percent of Annual Proceeds shall be available for disbursement in whole or partial payment of monetary awards made by the Claims Tribunal.

(d) Any Annual Proceeds which are not required for the disbursements set forth in Section 1 through 6 and subsection 7(b) and 7(c) of this Article shall either be made a part of the Fund or be used by the Government of the Marshall Islands for other programs and services for the people of the Marshall Islands as their unique needs and circumstances resulting from the Nuclear Testing Program may require, including continuation of the technical assistance referred to in Section 1 of this Article, the operation of the Claims Tribunal, the survey and analysis of the radiological status of the Marshall Islands, and distributions to local government councils so that they may establish and maintain programs and services for their people as their unique needs and circumstances resulting from the Nuclear Testing Program may require.

Section 8—Bikini, Enewetak, Rongelap and Utrik Trusts

In order to provide an additional long-term means to address consequences of the Nuclear Testing Program, the people of Bikini, Enewetak, Rongelap and Utrik shall each for their own benefit provide for the establishment of a trust funded with all or a portion of the Annual Proceeds they shall receive under this Agreement. Each trust shall be designed to provide a perpetual source of income for its respective recipients, and shall be developed in consultation with the Government of the Marshall Islands. The understandings reached shall, in consultation with the Government of the United States, be appended to this Agreement as Agreed Minutes. The establishment of each trust in accordance with the applicable Agreed Minute is a condition to disbursement of Annual Proceeds by the Fund Manager to the respective distribution authorities.

Article III

Distribution Authority

Section 1—Designated Distribution Authorities

The local government council for Bikini/Kili, Enewetak/Ujelang, Rongelap and Utrik shall be the distribution authority for the people of Bikini, Enewetak, Rongelap and Utrik, respectively. Each distribution authority shall, as set forth in this Agreement, receive and distribute, invest, or otherwise expend Annual Proceeds.

Section 2—Additional Distribution Authorities

The Claims Tribunal may, from time to time, establish additional distribution authorities as it deems appropriate and necessary to carry out the intent of this Agreement.

Section 3—Disbursements and Recordation

(a) Distribution, investment and other expenditure of Annual Proceeds by a distribution authority shall be made in accordance with customary law and traditional practice of the Marshall Islands, the Constitution of the Republic of the Marshall Islands, and this Agreement.

(b) A distribution authority may assign its right to receive sums provided under this Agreement, provided that the assignment is consistent with this Agreement and provided that the distribution authority indemnifies and holds harmless the Fund Manager, the Government of the Marshall Islands and the Government of the United States for any claims arising from the assignment.

(c) Each distribution authority shall, for purposes of notification to the public and all interested parties regarding its determination and actions, deposit with the Claims Tribunal an accounting of its annual disbursements, within 120 days after the end of each Marshall Islands fiscal year. Such accounting shall include a list of the names of all individuals receiving payments and the amounts received, and state the amounts disbursed for every other purpose.

Article IV

Claims Adjudication Process

In furtherance of the desire of the Government of the Marshall Islands to provide an additional long-term means for compensating claims resulting from the Nuclear Testing Program:

Section 1—Establishment and Operation of the Claims Tribunal

(a) The Government of the Marshall Islands, prior to the first anniversary of the effective date of this Agreement, shall establish a Claims Tribunal, in accordance with its constitutional processes and this Agreement. The Claims Tribunal shall have jurisdiction to render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program, and disputes arising from distributions under Article II and III of this Agreement. This section confers in the Claims Tribunal no jurisdiction over the United States, its agents, employees, contractors, citizens or nationals with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program.

(b) In the exercise of its jurisdiction, the Claims Tribunal shall be independent of the legislative and executive powers of the Government of the Marshall Islands.

(c) The Claims Tribunal shall have power to issue writs and other processes, make rules and orders and promulgate other procedural regulations, not inconsistent with the laws of the Marshall Islands and this Agreement, as may be required. Such power shall include the authority to make orders for the attendance of witnesses with or without documents, and to make orders for the disposal of exhibits.

(d) Members of the Claims Tribunal shall be persons qualified by education, experience and character to discharge judicial office, shall hold office during good behavior for a set term of at least three years, and shall be appointed pursuant to procedures adopted by the

Government of the Marshall Islands in accordance with its constitutional processes.

(e) A member of the Claims Tribunal may be removed from office only pursuant to procedures adopted by the Government of the Marshall Islands in accordance with its constitutional processes and only on the ground of clear failure or inability faithfully to discharge the duties of such office or for the commission of treason, bribery, or other high crimes or abuses inconsistent with the authority of his office.

(f) No member of the Claims Tribunal shall take part in the decision of a claim as to which he has a conflict of interest or the appearance of a conflict of interest.

(g) The compensation of a Claims Tribunal member shall not be changed during his term of office.

Section 2—Awards and Costs of the Claims Adjudication Process

In making any award, the Claims Tribunal shall take into account the validity of the claim, any prior compensation made as a result of such claim and such other factors as it may deem appropriate. Costs of proceedings before the Claims Tribunal shall be a charge on Annual Proceeds, subject to determination of the Claims Tribunal, the laws of the Marshall Islands and distributions made under Sections 1 through 6 of Article II of this Agreement. Such costs shall also include the cost of defending the Fund.

Section 3—Governing Law

In determining any legal issue, the Claims Tribunal may have reference to the laws of the Marshall Islands, including traditional law, to international law and, in the absence of domestic or international law, to the laws of the United States.

Article V

Tax Provisions

Section 1—Exemption from United States Taxation

The sums provided for in Articles I and II of this Agreement, and any earnings derived therefrom, shall not be subject to any form of taxation by the United States or its political subdivisions to the extent that those sums and any earnings derived therefrom remain intact in an institution in the United States. Distribution of those sums and any earnings derived therefrom to individuals or other entities shall not be a transaction taxable by the Government of the United States, but, after distribution, the earnings of such distributed funds shall not be entitled to the tax exemption provided in this Section.

Section 2—Exemption from Marshall Islands Taxation

The sums provided for in Articles I and II of this Agreement and any distribution of those sums shall not be subject to taxation by the Government of the Marshall Islands, but, after distribution to individuals or other entities, the earnings of such distributed funds shall not be entitled to the tax exemption provided in this Section.

Section 3—Other Exemptions

The exemptions provided pursuant to Sections 1 and 2 of this Article are without prejudice to any exemptions otherwise applicable.

Article VI

Resettlement of Bikini Atoll and Conveyance of Property in respect to Bikini Atoll and Enewetak Atoll

Section 1—Resettlement

The Government of the United States reaffirms its commitment to provide funds for the resettlement of Bikini Atoll by the people of Bikini at a time which cannot now be determined.

Section 2—Bikini Sunken Vessels and Cable

Pursuant to Section 234 of the Compact, any rights, title and interest the Government of the United States may have to sunken vessels and cable situated in the Bikini lagoon as of the effective date of this Agreement is transferred to the Government of the Marshall Islands without reimbursement or transfer of funds. It is understood that unexpended ordnance and oil remains within the hulls of such sunken vessels, and that salvage or any other use of these vessels could be hazardous. By acceptance of such right, title and interest, the Government of the Marshall Islands shall hold harmless the Government of the United States from loss, damage and liability associated with such vessels, ordnance, oil and cable, including any loss, damage and liability that may result from salvage operations or other activity that the Government of the Marshall Islands or the people of Bikini take or cause to be taken concerning such vessels or cable. The Government of the Marshall Islands shall transfer, in accordance with its constitutional processes, title to such vessels and cable to the people of Bikini.

Section 3—Enewetak Cable

Pursuant to Section 234 of the Compact, any right, title and interest the Government of the United States may

have to cable situated in the Enewetak lagoon as of the effective date of this Agreement shall vest in the Government of the Marshall Islands without reimbursement or transfer of funds. By acceptance of such right, title and interest, the Government of the Marshall Islands shall hold harmless the Government of the United States from loss, damage and liability associated with such cable and shall transfer, in accordance with its constitutional process, title to such cable to the people of Enewetak.

Article VII

Utilization of Lands

The Government of the United States is relieved of and has no responsibility for, and the Government of the Marshall Islands, consistent with its constitutional processes, shall have and exercise responsibility for, controlling the utilization of areas in the Marshall Islands affected by the Nuclear Testing Program. Assistance to the Government of the Marshall Islands from the Government of the United States in respect to the exercise of such responsibility by the Government of the Marshall Islands is set forth in full in this Agreement.

Article VIII

Northern Marshall Islands Radiological Survey

The Government of the United States has concluded that:

(a) The Northern Marshall Islands Radiological Survey and related environmental studies conducted by the Government of the United States represent the best effort of that Government accurately to evaluate and describe radiological conditions in the Marshall Islands; and

(b) The Northern Marshall Islands Radiological survey and related environmental studies have been made available to the Government of the Marshall Islands and can be used for the evaluation of the food chain and environment and estimating radiation-related health consequences of residing in the Northern Marshall Islands after 1978.

Article IX

Changed Circumstances

If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

Article X

Espousal

Section 1—Full Settlement of All Claims

This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equita-

ble or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

Section 2—Termination of Legal Proceedings

The Government of the Marshall Islands shall terminate any legal proceedings in the courts of the Marshall Islands against the United States, its agents, employees, contractors and citizens and nationals, involving claims of the Government, citizens and nationals of the Marshall Islands, arising out of the Nuclear Testing Program and shall nullify all attachments or any judgments attained relating to such proceedings.

Article XI

Indemnity

Subject to Article IX, and in consideration for the payment of the amounts set forth in this Agreement, the Government of the Marshall Islands, on behalf of itself and its citizens and nationals, shall indemnify and hold harmless the United States, its agents, employees, contractors and citizens and nationals, from all claims set forth in Article X of this Agreement, and all actions or proceedings which may hereafter be asserted or brought by or on behalf of the Government of the Marshall Islands, its citizens and nationals, in any court or other judicial forum based on, arising out of or in any way related to the Nuclear Testing Program. The amount of such indemnification shall not, in the aggregate, exceed $150 million, and the Government of the Marshall Islands shall use or cause the Fund, or other

sums available to it, to be used as necessary to cover or satisfy the indemnification set forth in this Article.

Article XII

United States Courts

All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

Article XIII

Administrative Provisions

Section 1—Effective Date

This Agreement shall come into effect simultaneously with the Compact in accordance with Section 177 of the Compact.

Section 2—Implementation

The Government of the Marshall Islands shall take all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement and the implementation of this Agreement in accordance with its terms.

Section 3—Consultation

(a) The Government of the United States and the Government of the Marshall Islands shall consult at the request of either of them on matters relating to the provisions of this Agreement.

(b) The Government of the Marshall Islands may, from time to time, request from the Government of the United States assistance of an advisory nature with re-

spect to the implementation of this Agreement, including the investment of the Fund in instruments of the Government of the United States and the establishment and operation of the Claims Tribunal. Such advisory assistance shall be provided in accordance with the provisions of Section 226 of the Compact.

Section 4—Amendment

This Agreement may be amended at any time by mutual consent of the Government of the United States and the Government of the Marshall Islands.

Section 5—Duration

This Agreement shall remain in full force and effect until terminated or otherwise amended by mutual consent.

Section 6—Definitions

(a) The Definition of Terms set forth in Article VI of Title Four of the Compact is incorporated in this Agreement.

(b) The term "citizens and nationals" of the Marshall Islands or United States, as the case may be, includes:

(1) a natural person who is a citizen of the Marshall Islands or the United States, and

(2) a corporation or other legal entity which is organized under the laws of the Marshall Islands or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico.

APPENDIX F

July 18, 1947
T.IA.S. 1665

[61 Stat. 3301]

Agreement approved by the Security Council of the United Nations April 2, 1947, respecting trusteeship for the former Japanese mandated islands. Approved by the President of the United States of America July 18, 1947, pursuant to authority granted by a joint resolution of the Congress of the United States of America July 18, 1947; entered into force July 18, 1947.

TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS APPROVED AT THE ONE HUNDRED AND TWENTY-FOURTH MEETING OF THE SECURITY COUNCIL

PREAMBLE

WHEREAS Article 75 of the Charter of the United Nations provides for the establishment of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent agreements; and

WHEREAS under Article 77 of the said Charter the trusteeship system may be applied to territories now held under mandate; and

WHEREAS on 17 December 1920 the Council of the League of Nations confirmed a mandate for the former German islands north of the equator to Japan, to be

administered in accordance with Article 22 of the Covenant of the League of Nations;[1] and

WHEREAS Japan, as a result of the Second World War, has ceased to exercise any authority in these islands;

NOW, THEREFORE, the Security Council of the United Nations, having satisfied itself that the relevant articles of the Charter have been complied with, hereby resolves to approve the following terms of trusteeship for the Pacific Islands formerly under mandate to Japan.

ARTICLE 1

The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the trust territory.

ARTICLE 2

The United States of America is designated as the administering authority of the trust territory.

[3302]

ARTICLE 3

The administering authority shall have full powers of administration, legislation, and jurisdiction over the

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[1] [*Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers*, 1910-1923, Vol. III, p. 3342, compiled by C. F. Redmond, Washington, D. C.]

territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

ARTICLE 4

The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall, as specified in Article 83(2) of the Charter, apply the objectives of the international trusteeship system, as set forth in Article 76 of the Charter, to the people of the trust territory.

ARTICLE 5

In discharging its obligations under Article 76(a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;

2. to station and employ armed forces in the territory; and

3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.

ARTICLE 6

In discharging its obligations under Article 76(b) of the Charter, the administering authority shall:

1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop their participation in government; shall give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

2. promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural [3303] resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication;

3. promote the social advancement of the inhabitants, and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination; protect the health of the inhabitants; control the traffic in arms and ammunition, opium and other dangerous drugs, and alcohol and other spirituous beverages; and institute such other regulations as may be necessary to protect the inhabitants against social abuses; and

4. promote the educational advancement of the inhabitants, and to this end shall take steps toward the establishment of a general system of elementary education; facilitate the vocational and cultural advancement of the population; and shall encourage qualified students to pursue higher education, including training on the professional level.

ARTICLE 7

In discharging its obligations under Article 76 (c), of the Charter, the administering authority shall guarantee to the inhabitants of the trust territory freedom of conscience, and, subject only to the requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship, and of religious teaching; and freedom of migration and movement.

ARTICLE 8

1. In discharging its obligations under Article 76(d) of the Charter, as defined by Article 83 (2) of the Charter, the administering authority, subject to the requirements of security, and the obligation to promote the advancement of the inhabitants, shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favourable than that accorded therein to nationals, companies and associations of any other United Nation except the administering authority.

2. The administering authority shall ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice.

3. Nothing in this Article shall be so construed as to accord traffic rights to aircraft flying into and

out of the trust territory. Such rights shall be subject to agreement between the administering authority and the state whose nationality such aircraft possesses.

4. The administering authority may negotiate and conclude commercial and other treaties and agreements with Members of the United Nations and other states, designed to attain for the inhabitants of the trust territory treatment by the Members of the United Nations and other states no less favourable than that granted by them [3304] to the nationals of other states. The Security Council may recommend, or invite other organs of the United Nations to consider and recommend, what rights the inhabitants of the trust territory should acquire in consideration of the rights obtained by Members of the United Nations in the trust territory.

ARTICLE 9

The administering authority shall be entitled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement.

ARTICLE 10

The administering authority, acting under the provisions of Article 3 of this agreement, may accept membership in any regional advisory commission, regional authority, or technical organization, or other voluntary association of states, may co-operate with spe-

cialized international bodies, public or private, and may engage in other forms of international co-operation.

ARTICLE 11

1. The administering authority shall take the necessary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory.

2. The administering authority shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority.

ARTICLE 12

The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.

ARTICLE 13

The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

ARTICLE 14

The administering authority undertakes to apply in the trust territory the provisions of any international conventions and recommendations which may be appropriate to the particular circumstances of the trust territory and which would be conducive to the achievement of the basic objectives of Article 6 of this agreement.

[3305]

ARTICLE 15

The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

ARTICLE 16

The present agreement shall come into force when approved by the Security Council of the United Nations and by the Government of the United States after due constitutional process.[2]

Certified corrected true copy
For the Security Council Affairs Department

/s/

D. Protitch

Director in charge of Security Council Affairs Department

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[2] [Approved by the Security Council of the United Nations, Apr. 2, 1947; and by the Government of the United States of America, July 18, 1947.]

APPENDIX G

NUCLEAR CLAIMS TRIBUNAL
REPUBLIC OF THE MARSHALL ISLANDS

NCT No. 23-0902

IN THE MATTER OF THE PEOPLE OF ENEWETAK, *et al.*,
CLAIMANTS FOR COMPENSATION

Apr. 13, 2000

MEMORANDUM OF DECISION AND ORDER

On July 16, 1990, the People of Enewetak filed this class action claim with the Marshall Islands Nuclear Claims Tribunal, for damages to land resulting from or arising out of, the Nuclear Testing Program conducted by the United States between 1946 and 1958. The Tribunal has jurisdiction to hear this claim under Section 5(a) of the Marshall Islands Nuclear Claims Tribunal Act 1987, as amended ("NCTA")[1] which gives the Tribunal the duty and responsibility to "decide claims by and disburse compensation to the Government and citizens and nationals of the Marshall Islands under Section 123 for existing and prospective loss of damage to person or property which are based on, arise out of or are in any way related to the Nuclear Testing Program..." The question of damages was heard in stages, with the loss of use portion of the claim being heard on January 24 and 27, 1997, and the rehabilitation and other consequential damages portion being heard on April 14 through April 22, 1999.

[1] 42 MIRC 105(a).

The issues of fact and law were narrowed in this case through an extended process of filings of prehearing statements which formed the basis for establishing contested and uncontested issues. Based upon that process, the following uncontested factual background has been established.

I. Factual Background

Enewetak atoll is a low-lying coral atoll located in the northwestern corner of the Marshall Islands, approximately 600 miles from the capital, Majuro. The atoll consists of about 40 islands surrounding a lagoon of about 388 square miles. In February, 1944, U.S. troops captured Enewetak from the Japanese. In July, 1947, Micronesia became a United Nations strategic trust territory administered by the United States. In June of 1946, the U.S. began the conduct of the United States Nuclear Testing Program in the northern Marshall Islands. In December, 1947, the people of Enewetak were removed from Enewetak Atoll and transported to Ujelang Atoll. Representatives of the U.S. government represented to the people that the relocation would be temporary, in the likely time frame of three to five years, at which time they could return to Enewetak. At the time of removal, the acreage of the atoll was 1,919.49 acres. During the people's absence, forty-three atomic devices were tested at Enewetak. On October 1, 1980, the claimants returned to Enewetak. At that time, 815.33 acres were returned to their use. Another 949.8 acres were not available for use, and an additional 154.36 acres had been vaporized.

II. Framework of compensation analysis

In the Compact of Free Association, the Government of the United States and the Government of the Marshall Islands made provision for the "just and ade-

quate settlement" of claims of Marshallese citizens resulting from the U.S. nuclear testing program in the northern Marshall Islands between June 30, 1946 and August 18, 1958.[2] The framework for this settlement was more fully set out in the related agreement ("Section 177 Agreement") to implement this section of the Compact.[3] The Section 177 Agreement required the establishment of a Claims Tribunal to "render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program" and to make awards taking into account "the validity of the claim, any prior compensation made as a result of such claim, and such other factors as it may deem appropriate."[4] This language is echoed at Section 123(12) of the NCTA.[5] The Section 177 Agreement further provides: "In determining any legal issue, the Claims Tribunal may have reference to the laws of the Marshall Islands, including traditional law, to international law and, in the absence of domestic or international law, to the laws of the United States."[6] The NCTA directs that in claims for property loss or damage: "The amount of compensation shall be determined on a case by case basis, taking into consideration, among other things, the

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[2] Compact of Free Association, Section 177.

[3] Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association.

[4] Section 177 Agreement, Article IV, Section 2.

[5] 42 MIRC 123(12).

[6] Section 177 Agreement, Article IV, Section 3.

amount of property owned, the nature of the ownership interest, and the extent of the loss or damage."[7] In the event the Tribunal determines the claimants suffered loss or damage to person or property, the award order shall "*fully compensate* the people for loss or damage to person or property"[8] (emphasis added.)

The goal of compensation, where there has been harm to property, should be to make the owner whole through the award of proper damages. A general statement for determination of damages to land may be found at the Restatement (Second) Torts §929, *Harm to Land from Past Invasions*:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

> (a) the difference between the value of the land before the harm and after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,
>
> (b) the loss of use of the land, and
>
> (c) the discomfort and annoyance to him as an occupant.

This is not an eminent domain proceeding nor a claim under constitutional provisions for just compensation for a taking of property for a public use. Neither the U.S. nor R.M.I. government is a party to this action, and consequently certain elements in a determina-

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[7] 42 MIRC 123(15).

[8] 42 MIRC 123(17)(b)(iii).

tion of just compensation are not present. Nonetheless, principles of just compensation, to the extent that they aid in a determination of what is necessary to make claimants whole, may be referenced by this Tribunal where appropriate.

Both the United States and Marshall Islands Constitutions prohibit the taking of private property for public use without just compensation.[9] In the U.S. Constitution, this prohibition is found in the Fifth Amendment, where it states in relevant part: "... nor shall private property be taken for public use, without just compensation."[10] In the Marshall Islands Constitution, this prohibition is found in the fifth section of Article II, where it states in part: "Before any land right or other form of private property is taken, there must be a determination by the High Court that such taking is lawful and an order by the High Court providing for

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[9] Representatives of the U.S. government committed that the relocated inhabitants of Enewetak would "be accorded all rights which are the normal constitutional rights of citizens under the Constitution ..." (See Claimants's Exhibits 24, 25, 26 and 27.)

[10] The Fifth Amendment in its entirety reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, [o]r in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.* (Emphasis added)

Fifth Amendment, Constitution of the United States.

prompt and just compensation." That Section of the Marshallese Constitution[11] provides additional protec-

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[11] Article II, Section 5 of the Marshallese Constitution reads in its entirety:

> (1) No land right or other private property may be taken unless a law authorizes such taking; and any such taking must be by the Government of the Republic of the Marshall Islands, for public use, and in accord with all safeguards provided by law.
>
> (2) A use primarily to generate profits or revenues and not primarily to provide a public service shall not be deemed a "public use."
>
> (3) Land rights shall not be taken if there exist alternative means, by landfill or otherwise, of achieving at non-prohibitive expense the purpose to be served by such taking.
>
> (4) Before any land rights or other form of private property is taken, there must be a determination by the High Court that such taking is lawful and an order by the High Court providing for prompt and just compensation.
>
> (5) Where any land rights are taken, just compensation shall include reasonably equivalent land rights for all interest holders or the means to obtain the subsistence and benefits that such land rights provide.
>
> (6) Whenever the taking of land rights forces those who are dispossessed to live in circumstances reasonably requiring a higher level of support, that fact shall be considered in assessing whether the compensation provided is just.
>
> (7) In determining whether compensation for land rights is just, the High Court shall refer the matter to the Traditional Rights Court and shall give substantial weight to the opinion of the latter.
>
> (8) An interest in land or other property shall not be deemed "taken" if it is forfeited pursuant to law for non-payment of taxes or debt or for commission of crime, or if

tion for land rights and provides how a determination of just compensation is to be made, based in part on the "unique place of land rights in the life and law of the Republic."

III. Loss of Use

The people of Enewetak were denied the use of their land for a period of years. They are entitled to compensation for this loss. No claim is made that there was a permanent taking or that the United States took ownership of the property in question.[12] Consequently it is appropriate to analyze the damage in terms of the lost use to claimants. The U.S. Supreme Court examined the question of the appropriate measure of dam-

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it is subjected only to reasonable regulation to protect the public welfare.

(9) In construing this Section, a court shall have due regard for the unique place of land rights in the life and law of the Republic.

[12] The most straight forward statement of this is that of the Captain John P.W. Vest, who had been appointed Governor of the Marshall Islands, in describing his meeting with the people of Enewetak prior to their relocation:

> I told them they would be able to return to Enewetak fairly soon after the tests were completed; perhaps in three to five years. It certainly was not in my mind that it would be longer than that, or that the taking of Enewetak for the testing program was permanent. At the time it was my understanding, and I believe their understanding as well as a result of our discussions, that the people of Enewetak would be able to return to Enewetak Atoll after the testing was concluded, and that the likely time frame for this return was three to five years.
>
> (Affidavit of John P.W. Vest, Claimants' Exhibit 9.)

ages for such lost use in *Kimball Laundry Co. v United States* (1949) 338 US 1. That case involved the damages suffered by the owners of a laundry taken on a temporary basis by the government during World War II. The Court determined:

> But it was known from the outset that this taking was to be temporary, and determination of the value of temporary occupancy can be approached only on the supposition that free bargaining between petitioner and a hypothetical lessee of that temporary interest would have taken place in the usual framework of such negotiations. We agree with both lower courts, therefore, that *the proper measure of compensation is the rental that probably could have been obtained*, and so this Court has held in the two recent cases dealing with temporary takings. United States v. General Motors Corp. 323 US 373, 89 L ed 311, 65 S Ct 357, 156 ALR 390; United States v. Petty Motor Co. 327 US 372, 90 L ed 729, 66 S Ct 596.[13] (Emphasis added.)

To address the value of this lost use, Claimants and the Defender of the Fund offered a joint appraisal[14] report conducted by a team of appraisers consisting of two appraisal firms, one selected by Claimants and one selected by the Defender of the Fund. No objection was raised to the qualifications of the firms and the

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[13] *Kimball Laundry Co. v United States* (1949) 338 US 1, 93 L Ed 1765, 69 S Ct 1434 (7 ALR2d 1280, 1287-8).

[14] This joint approach was authorized by the Tribunal in the interest of efficiency and economy in the determination of claims.

Tribunal found them to be qualified as experts on the matter of valuation of the property in question.

A. Methodology.

The value of the loss of use may be calculated by multiplying the relevant annual rental value times the affected acreage times the period of years use of the land was lost to the owners. The period of loss has two elements: 1) past loss, which began on December 12, 1947 and ran until the date of the valuation, and 2) future loss, which began on the date of valuation and continues until such time in the future as the affected property is returned to the people of Enewetak in usable condition, determined by the parties to be 30 years from the effective date of the valuation or May 17, 2026. Additionally, adjustment must be made for the deferred nature of the compensation for past loss and a discount for future loss.

B. Annual Rental Value.

The appraisers acknowledged that there are circumstances in the Marshall Islands property ownership situation that create challenges to traditional appraisal methods. These include a customary system of land tenure that is collective in nature and does not include the concept of market value. Ownership of land by foreigners is forbidden by law. As declared by claimants:

> The people of Enewetak have always maintained a deep emotional attachment to their home islands and ancestral land. Under traditional Enewetak land tenure law and custom, every individual was—and still is—born with land rights in the islands of Enewetak Atoll and, collectively with other members of the community, rights to the atoll's lagoon and its

> resources. These rights provide security to the members of the community. Land is traditionally regarded as a commodity that is not to be sold, even to other members of the Enewetak community, but may only be passed from generation to generation. Each individual is identified with the land that is his birthright, and ties to the land are unusually strong. Throughout Enewetak history land has been regarded as sacred. It has never been sold to outsiders except through fear of physical force or other sanction.[15]

Nonetheless, as time has gone by, the transfer of use rights or possessory interests in land for money has gained a measure of social acceptance and from these transfers the appraisers developed a data base of comparable transactions.

The appraisers determined the islands should be categorized as rural, with a highest and best use of agricultural and residential uses. Two elements of their analysis of comparables bear notice. First is that for the category of rural lands which were deemed to be comparable for the purposes of their market analysis, there was no significant difference in pricing on the basis of the size of the parcel. As noted in their report: "An island or large weto rented for about the same price per acre as a small parcel."[16] Indeed, the apprais-

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[15] Paragraph 20, CLAIM, In the Matter of the People of Enewetak, NCT No. 23-0902, filed July 16, 1990.

[16] *Appraisal Report of the Loss in Value in Enewetak Atoll, Republic of the Marshall Islands*, jointly prepared by The Hallstrom Group, Inc. and Raymond A. Lesher & Co, Ltd. Claimants'

ers reiterated their point in a post-hearing submission to the Tribunal. "We confirm that is was and remains our conclusion that the historic per acre rental rates (including the 'National Rate') in the Marshall Islands do not vary by size or location."[17] Second is that for rural lands (which all of Enewetak was determined to be) the rental rate was similar regardless of the rural use, e.g., residential or agricultural.[18] James Hallstrom, one of the appraisers who authored the joint report, testified at the loss of use hearing that while consideration was given to including values from outside the Marshall Islands, this approach was rejected because it would have required a considerable degree of subjective adjustments for location. Only Marshall Island transactions were considered as they were more directly germane.

Over 470 transactions were collected to be reviewed for comparability with the property at issue. Of these, some 174 of the properties were determined to be comparable to the subject. Despite this extensive database, there was a relative scarcity of transactions in the early years of the lost use. This problem was addressed through trending analysis from which the annual rates could be derived. This analysis combined two different approaches. One approach utilized a pure exponential trend fit to the database. The other ap-

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Exhibit 1, Defender of the Fund's Exhibit A (hereafter "Joint Appraisal,") p. 22

[17] "Response to Questions Regarding the Joint Appraisal of Enewetak Atoll," from Raymond Lesher and James Hallstrom to Tribunal Members, dated January 31, 1997, filed March 12, 1997 (hereafter "Response Letter.")

[18] Joint Appraisal, p. 22.

proach utilized an exponential fit for the first twenty years of the period of lost use and subsequently incorporated the government rental rate because of its acceptance as a fairly determined rate of rent and its widespread use as a benchmark for private lease agreements. In both cases, the use of an exponential curve was justified on the basis that "its relatively low statistical deviation from the data [compared to other different curves tested] ... more accurately simulat[ed] market activity over time."[19] This correlated approach resulted in annual rental values ranging from $41 per acre in 1947 to $4,105 per acre in 1996.

The valuation must additionally recognize the effect of the lost use of the proceeds from the annual rentals. Adjustment for past loss is made by adding an interest component to the annual proceeds, which was compounded using the average annual U.S. Treasury 30-year bond rate as the benchmark rate of investment.[20]

C. Acreage and period of lost use.

In this case, the parties have agreed on the relevant land areas and period of lost use.[21] They are as follows:

12/21/1947 to 09/30/1980	1,919.49 acres
10/01/1980 to 01/24/1997[22]	1,104.16 acres

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[19] Response Letter (f.n. 15.)

[20] Joint Appraisal, p. 27.

[21] Claimants' Exhibit 3, Defender's Exhibit C.

[22] Date of the hearing on loss of use.

01/24/1997 to 5/16/2026[23] 1,104.16 acres.

Included in the loss of use calculations is the acreage of the vaporized islands. Although arguably these islands were permanently lost upon their vaporization, the Tribunal is persuaded to treat them as temporarily lost for the following reasons. First, in the context of this class action, the vaporized islands must be regarded as a part of an environmental whole which consists of the entire atoll ecosystem. Thus, although a portion of the atoll was damaged through the destruction of the vaporized islands, the atoll as a whole is the relevant unit for characterization of the loss. Secondly, the problems with determining a fee simple value in the Marshall Islands where such transactions are virtually unknown and not subject to market analysis preclude the evaluation of such a loss.

Based upon the annual rental rates, the affected acreage and number of years to the date of the hearing, the rental values for past lost use (including interest) amount to $304,000,000.[24]

These values must be further adjusted for compensation already received by the People of Enewetak. The Defender of the Fund initially put forth nineteen items of prior compensation to be considered by the

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[23] Although Claimants' Exhibit 3, Defender's Exhibit C adjusted past loss to the date of the hearing on loss of use, no adjustment was made to the period of future lost use.

[24] The calculation of this number is found in Claimants' Exhibit 5 and Defender's Exhibit E. The exact calculation was $304,257,512, which the appraisers rounded to the nearest million dollars.

Tribunal.[25] In its ORDER,[26] the Tribunal recognized eleven of these items as potentially appropriate for consideration and granted the Defender the opportunity to present evidence on those items. Two additional items were denied with the provision that the Defender could bring them forward for reconsideration if additional information relating to them became available. The parties resolved their differences on these issues via stipulation which provided for valuation of six of the items.[27] The items of prior compensation are as follows: payment made to the people of Enewetak on or about November 19, 1956 in the amount of $175,000; payment made to the people of Enewetak on or about August 19, 1969 in the amount of $1,020,000; payment made to the people of Enewetak on or about September 30, 1976 in the amount of $750,000; payment made to the people of Enewetak on or about December 18, 1978 in the amount of $750,000; annual payments of $3,250,000 from 1987 through 1999 pursuant to the Section 177 Agreement;[28] and the amount of $10 million for resettlement of Enjebi Island.

The stipulation also provided for valuation of the use of Ujelang by the people of Enewetak from Decem-

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[25] MOTION TO CONSIDER THE PRIOR COMPENSATION TO CLAIMANTS STATED IN EXHIBIT "A" AS A SET-OFF AGAINST ANY AWARD OF DAMAGES, filed by the Defender of the Fund on June 16, 1997.

[26] ORDER AND MEMORANDUM OF DECISION, filed November 28, 1997.

[27] Items 1, 3, 5, 6, 7, and 19 from Exhibit "A" of Defender's June 16, 1997 MOTION.

[28] Article II, Section 3.

ber 21, 1947 to September 30, 1980.[29] The annual per acre value for the use of Ujelang was determined to be fifty-eight percent of the annual per acre value of Enewetak. This reduction was based upon the relative scarcity of resources in Ujelang and the relative lack of access to off-island resources because of poor transportation to the atoll. These factors affect the highest and best use of the atoll. While Enewetak was determined to have the highest and best use of agricultural/residential uses, the lack of resources and transportation preclude such use in Ujelang.[30] This conclusion is reinforced by the absence of activity on Ujelang at the present time, even in light of the scarcity of land in the Marshall Islands.

Except for the Enjebi Trust Fund,[31] these items of prior compensation are set off against the annual past loss of use values in the year received by the Enewetak people. This has the effect of reducing the overall value of past lost use not only by the actual amount of the past payments, but also by reducing the interest on the net annual lost use value. In the case of Ujelang, the

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[29] In entering the stipulation, the claimants maintain their position that the use value of Ujelang should not be considered as prior compensation or an offset by the Tribunal (STIPULATION, filed March 17, 2000.) The Tribunal ruled in its DECISION AND ORDER of December 6, 1999 that the use of "Ujelang will be taken into consideration by the Tribunal as an item of prior compensation."

[30] See *Ujelang Atoll Consultation, Republic of the Marshall Islands*, prepared by the Hallstrom Appraisal Group January 11, 200, and filed with the Tribunal by Claimants in response to Tribunal order of December 6, 1999.

[31] The parties stipulated that the $10 million Enjebi Trust Fund would be set off against the restoration award.

annualized use value for each year between 1947 and 1980 (when the people returned to Enewetak) is set off against the respective annual loss of use values for Enewetak.[32]

The value of past lost use, adjusted for prior compensation, is $149,000,000.[33]

D. Compensation for Future Denied Use.

To determine the compensation for future loss of use, the appraisers utilized an income capitalization approach. As described in the Report: "This method is used to convert a single year's income into an indication of present value by dividing the most current stabilized income by an appropriate rate of return." This rate of return was determined to be eight per cent, based upon data from Marshall Islands transactions, as well as making reference the rate used in other Pacific islands.[34]

Claimants suggested alternatively that the value of future lost use be calculated as the "annual rental for land not available (presently 949.8 acres) at the minimum rate of $3,000 per acre per year until the lands become fully usable by the people of Enewetak, plus interest of at least 6.86% on such annual rental until paid."[35] Although the Tribunal perceives the rationale behind the reasoning for this calculation, such an ap-

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[32] The calculations are contained in Table 7A-1, part of the STIPULATION filed with the Tribunal on March 17, 2000.

[33] *Ibid.*

[34] Joint Appraisal, p. 28.

[35] Claimants' Exhibit 15.

proach would result in an open ended decision. The Tribunal is charged with the final determination of all claims past, present and future arising out of the nuclear testing program. Leaving undecided the question of how long the future lost use would last, is not consistent with the Tribunal's responsibility to make a final determination in this claim.

In the joint appraisal report the present value of the future rents for 1305.78 acres was (as of May 17, 1996) $67,000,000. This acreage was subsequently adjusted downward by stipulation of the parties to 1104.16 acres and the effective date of the appraisal was adjusted to the date of the hearing, January 24, 1997. However, the calculations for the loss of future use were not adjusted to reflect these changes. Because those calculations were based on a time period of thirty years, with a constant annual rental value, adjusted to present value, the $67,000,000 may be adjusted by the ratio of the actual acreage (1104.16) to the initial joint appraisal acreage (1305.78). That calculation gives a value for loss of future use of 1104.16 acres for thirty years of $56,654,811. Additionally, Claimants are additionally due $3,250,000 annually in 2000 and 2001 under Section 177 Agreement. This is compensation not yet paid and must be set off against the future loss of use portion of the award.

The value for lost future use, adjusted for anticipated Section 177 payments, is $50,154,811.

IV. Restoration

A. Restoration as appropriate remedy.

Under the Restatement (Second) Torts analysis at §929(1)(a), the injured party who suffered damage to land is entitled to compensation for "the difference be-

tween the value of the land before the harm and after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred." An initial issue is whether the appropriate measure under this subsection is the cost of restoration or the difference in value of the land before and after the harm. The Defender of the Fund raised this issue in the MOTION TO LIMIT CATEGORIES OF DAMAGES CLAIMANTS MAY BE AWARDED AND METHODS OF VALUING DAMAGES FOR CERTAIN CATEGORIES OF DAMAGES.[36] In Paragraph 7 of that MOTION, the Defender asks that the Tribunal "limit the valuation of damages pertaining to all permanent and proven damage and injury such as described in Paragraph 1, as claimant may properly plead and prove, to the value fixed as the difference between the fair market value immediately before the injury to the real property and the value immediately after the injury and interest thereon from the date of the injury." Although both parties submitted legal argument on the issue, the Tribunal found that the record was too undeveloped as to the underlying factual issues to allow a meaningful ruling on the legal issue and that aspect of the MOTION was denied without prejudice.[37] Although Defender has not renewed this aspect of the MOTION, the Tribunal will set out its reasoning for determining that the cost of restoration, rather than the difference in value before and after the injury, is the appropriate measure of damage in this instance.

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[36] Filed June 2, 1995.

[37] DECISION AND ORDER, filed August 11, 1995.

In the commentary to the cited Restatement provision, it is noted:

> Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. ... If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm. ... [I]f a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition, even though the market value of the premises has not been decreased by the defendant's invasion.[38]

This suggests that unless the cost of restoration is disproportionate to the difference in value before and after the injury to the land, such cost is an allowable measure of damage. Even when such disproportionality exists, if there is a personal reason for the cost of

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[38] *Restatement (Second) Torts*, Comment on Subsection (1), Clause (a), *b. Restoration.*

repair, these costs may be allowed. Case law supports this approach. See *Heninger v. Dunn* (Cal. App. 1980) 162 Cal. Rptr. 104, *Orndorff v. Christiana Community Builders* (Cal. App. 1980) 217 Cal. App. 3d 683. Further, if market value does not adequately capture the value or if is not possible to ascertain the market value of the land, the diminution in market value is not an appropriate measure of damage. See *Trinity Church v. John Hancock Mutual Life Insurance Co.* (Mass. 1987) 502 N.E. 2d 532, *Denoyer v. Lamb* (Ohio App. 1984) 490 N.E. 2d 615, *Feather River Lumber Co. v. United States* (9th Cir. 1929) 30 F.2d 642, 644.

In the present case, both of these conditions are met. There are personal reasons for restoration of the damaged land. These reasons are persuasively set forth by Claimants' expert, Dr. Lawrence Carrucci in his report to the Tribunal:

> For Marshall Islanders in general, and Enewetak people in particular, land is a part of one's person and one's entire identity. It is an integral part of a person's sense of who they are in the world and how their life makes sense as part of a certain culture. One's sense of self, both personal and cultural, is deeply embedded in a particular parcel of land on a particular atoll. ... Not only is land hyper-valued because it is scarce, land is extremely highly valued because it represents the collective labor of generations of people who have worked the land, transforming it from bush into habitable space [footnote omitted.] Both one's labor and one's physical person, at death, are embedded in land in a manner that irrevocably erases any distinction European's [sic] or Americans might make that would separate one's person and the

> clan or family land that one inhabits. While Europeans live and die, Enewetak people are but the most visible snippet of a very active group, a clan of relatives who share a totem-like identity, a clan or *jowi*. Not only does that group represent the continuity of life from ancient times until the current day (*jowi*), it is manifest in a second visible form, the family land that is the realization of generation upon generation of continuous human occupation that has made untended earth into soil through toil and the physical substance of persons embedded in the molecular structure of that soil.[39]

The shortcomings of a market approach to value, particularly with reference to fee simple rights, are set out in the appraisal report filed jointly by Claimants and the Defender of the Fund:

> Traditionally, Marshallese do not sell land rights which are acquired by birthright. Hence, there is an absence of a real estate market, and while the Marshallese customary system of land tenure has not only precluded the development of a normal market, it fosters an attitude about land which does not include the concept of market value.[40]

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[39] *Ien Entaan im Jerata: Times of Suffering and Ill Fortune: An Overview of Daily Life on Ujelang and Enewetak since 1946*, Laurence M. Carucci, Ph. D. and Mary H. Maifeld, M.A., R.D., A Report Submitted to the Marshall Islands Nuclear Claims Tribunal in behalf of the People of Enewetak, March, 1999, Claimants' Exhibit 147.

[40] Joint Appraisal, p. 15.

This point was reinforced in a post hearing submission by the joint appraisal team, where it was stated: "In the history of the Marshall Islands, there has never been any kind of established real estate market to justify such an approach. 'Fee simple' value cannot be derived, nor could anyone sell their birthright ownership."[41] Thus, the diminution in value approach to damages cannot be applied because there is no market in fee simple property to provide comparable values to assess the loss. Further, such a market approach would not provide a true measure of loss because it would not account for the deeply personal reasons of the Enewetak people for restoring their land.

Further support for the cost of restoration approach is found in U.S. environmental statutes. Although these laws may not be applicable by their terms to the Marshall Islands, the Section 177 Agreement provides "In determining any legal issue, the Claims Tribunal may have reference to the laws of the Marshall Islands, including traditional law, to international law and, in the absence of domestic or international law, to the laws of the United States."[42] The Tribunal has referenced U.S. law in a variety of contexts in the past. It has modeled its personal injury compensation program on the "Downwinders Program," devised to compensate civilians affected by the nuclear testing in Nevada and references the U.S. directly in its regulations for the purposes of determining conditions deemed

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[41] Response Letter, p. 3.

[42] Section 177 Agreement, Article IV, Section 3.

caused by the Nuclear Testing Program.[43] It has adopted certain policies and criteria of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in setting a radiation clean-up standard in the land claims consolidated for that purpose.[44] The Tribunal notes this for the purpose of observing the predisposition toward clean up as a remedy in dealing with hazardous waste in the U.S.[45] The preference for restoration by the U.S. is evidenced in the past U.S. attempts to restore the atoll for the claimants' use.

B. Establishment of Radiation Standard for Restoration.

The Tribunal considered the issue of radiation protection standards for application in clean up and restoration of lands contaminated by the Nuclear Testing Program in a special proceeding which consolidated the

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[43] NCT Regulation, Section 224(a), *Comparability with United States Compensation Schemes*:

> Section 220 shall be deemed to include any medical condition(s) not otherwise specifically listed or described for which a claimants would be entitled to compensation in the United States under either the Radiation-Exposed Veterans Compensation Act of 1988, as amended 38 U.S.C. 101 *et seq.* Note and/or the Radiation Exposure Compensation Act of 1990, as amended.

[44] MEMORANDUM OF DECISION AND ORDER, filed December 21, 1998.

[45] For a discussion of this legislative concern for restoration as a remedy in U.S. environmental statutes, see Cross, *Natural Resource Damage Valuation*, 42 Vanderbilt Law Review 269, 327-334.

various class action claims for damage to property. The Tribunal accepted the position of the IAEA[46] that

> As a basic principle, policies and criteria for radiation protection of populations outside national borders from releases of radioactive substances should be at least as stringent as those for the population within the country of release.[47]

Under this reasoning, the Tribunal adopted the current standards[48] of the U.S. that would apply to Enewetak, were it within the United States. Those standards, established by the U.S. Environmental Protection Agency, are described in an EPA document entitled "Establishment of Cleanup Levels for CERCLA Sites with Radioactive Contamination," wherein it is stated:

> Cleanup should generally achieve a level of risk with the 10^{-4} to 10^{-6} carcinogenic risk range

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[46] The International Atomic Energy Agency (IAEA) operates under the auspices of the United Nations. It serves as an international forum for scientific and technical cooperation for the peaceful development and safety of nuclear power. While one of its most important responsibilities is to monitor nuclear materials that pass internationally, it is also charged with establishing safety standards for health and property.

[47] Claimants' Exhibit 1 (filed for the consolidated hearing on radiation protection standards on November 18, 1998).

[48] These standards have undergone significant development over time, based in part upon a greater understanding of the health effects of radiation. This enhancement in scientific knowledge is a circumstance which has changed, particularly since the time the Compact of Free Association was negotiated.

> based on the reasonable maximum exposure for an individual. ...
>
> If a dose assessment is conducted at the site (footnote omitted) then 15 millirem per year (mrem/yr) effective dose equivalent (EDE) should generally be the maximum dose limit for humans.[49]

This standard addresses the additional risk created by the contamination, so the 15 millirem level is over and above existing background levels of radiation.

C. Application of Standard.

The parties introduced evidence relating to whether this 15 mrem standard is currently exceeded in Enewetak. The expert testimony[50] of both sides was in agreement that the major pathway or source of ra-

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[49] Claimants' Exhibit 11 (filed for the consolidated hearing on radiation protection standards on November 18, 1998), p. 5.

[50] The expert witnesses for claimants were Dr. John Mauro and Dr. Hans Behling, from Sanford Cohen and Associates (hereafter "SCA".) In addition to their testimony, claimants filed a two volume report, *Regarding The Potential Radiation Doses and Health Risks to a Resettled Population of Enewetak Atoll and An Evaluation of the Costs and Effectiveness of Alternative Strategies for Reducing the Doses and Risks* by Drs. Mauro, Behling and Anigstein. *Part 1: Statement Before the Nuclear Claims Tribunal* was admitted as Claimants' Exhibit 45, while *Part 2: Technical Background Document* was admitted as Claimants's Exhibit 46. The expert witnesses for the Defender of the Fund were Dr. George Levin and Dr. Michael Uziel (hereafter "Enviropro.[")] In addition to their testimony, the Defender filed *Cleanup Standards & Conceptual Remediation Alternatives of Nuclear Waste at Enewetak Atoll, the Republic of the Marshall Islands*, authored by Dr. Uziel of Enviropro, Inc., which was admitted as Defender of the Fund's Exhibit SS.

diation exposure to residents of Enewetak would be ingestion of locally grown foods. This pathway is of particular significance in Enewetak because the soil of the atoll allows a relatively high uptake of certain radionuclides by local plants. Both sides agreed that the primary radionuclide of concern was Cesium 137. Application of U.S. standard computer analysis provided that a concentration of cesium in the soil between .32 and .35 picocuries/cubic gram (including background) would result in an annual effective dose equivalent of 15 millirem assuming a local only diet. The Tribunal believes a local diet is an appropriate assumption for this determination. While the Tribunal recognizes that it may not be likely that the entire population will adhere to a local food only diet, even if available, the Tribunal accepts the EPA reasoning that protection should be extended not just to the average member of the community, but to those who could be characterized as having "high end risk." This concept is captured by the "reasonably maximally exposed individual."[51]

This concentration is the target for any clean-up effort. The parties are in relatively close agreement on this issue. Assuming a local diet, SCA found a cesium concentration of .247 to .274 pCi/g (depending on the methodology utilized for determination of exposure) above background[52] would result in an exposure of 15 mrem/year to the reasonably maximally exposed individual. With background added in, that would amount to a range between .327 and .354 pCi/g. Envirpro determined a concentration of .35 pCi/g would lead to an

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[51] Claimants' Exhibit 83.

[52] 08 pCi/g.

exposure of 15 mrem/yr based upon a local food only diet. The parties developed their remediation scenarios utilizing this concentration target.

D. Radiological Cleanup Costs.

The parties presented a number of alternative approaches to how the standard could be met. The basic techniques considered were removal of contaminated soil, application of potassium to the soil to reduce the plant uptake of cesium, and phytoremediation (the use of plants to strip the radioactive contaminants from the soil.) While phytoremediation is a promising, developing technology, its effectiveness in Enewetak cannot be evaluated. It is clear that the concept is valid, because the uptake of Cs-137 from the soil by food plants is the major pathway for exposure to residents. However, the application of the technique for cleanup of radioactive contaminants has not been demonstrated in the coral atoll environment and there is no reliable data to assess costs associated with such a clean up effort. In contrast, considerable testing has been done on the application of potassium to the soil to block the uptake of Cs-137 in this environment.[53] The reports cited by SCA indicate potassium applications reduce the cesium uptake by a factor of ten. Where concentrations are higher, this technique would be ineffective. Additionally, potassium does not "clean-up" the soil, it simply blocks the uptake of the cesium. Applications would have to continue until natural processes (primarily radioactive decay) reduced the radioactivity to acceptable levels.

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[53] Claimants' Exhibit 46 contains an eleven page appendix assessing the effectiveness of potassium spreading in the critical environment. The references include articles by Dr. William Robison, relating to his work with potassium applications on Bikini Atoll.

Soil removal is a tested technology, and was utilized by the U.S. in Enewetak in past cleanup efforts. However, it involves the excavation and disposal of significant volumes of contaminated soil. An important drawback to this alternative is the attendant ecological disruption which results from the removal of the topsoil from the environment. Both SCA[54] and Enviropro[55] remark on this problem. Nonetheless, based upon our review of the proposed alternatives, it is clear that soil removal must be at least a component of the cleanup strategy.

The estimates of volume of contaminated soil involved range from approximately 1.5 million cubic meters[56] to about 1.9 million cubic meters.[57] SCA devised a unit cost analysis for costs of cleanup based upon, in part, extensive analysis conducted by the Bikini Atoll Rehabilitation Committee. The unit cost for removal and replacement[58] of soil on Enewetak was estimated to be $101 per cubic meter. However, that does not include the cost of disposal of the contaminated soil. Off island disposal unit costs ranged from $262/cubic meter[59] to $13,790/cubic meter[60], while on-island disposal

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[54] Claimants' Exhibit 45 at p. 90.

[55] Defender of the Fund's Exhibit SS at p. 49.

[56] Enviropro, Defender of the Fund's Exhibit SS, Table 4.2.2-2.

[57] Claimants' Exhibit 45, p. 46.

[58] The replacement soil is from dredging the lagoon. There is no significant organic component, and consequently this replacement soil may not be regarded as constituting a return to agricultural productivity.

[59] At Envirocare, Utah (Claimants' Exhibit 46, Table 4-11, p. 4-34.)

costs ranged from $9.09/cubic meter[61] to $377/cubic meter[62]. Clearly, any reduction in the volume of soil removed would result in significant cost reduction as well as reduction in the attendant ecological disruption. One such reduction may be achieved by acknowledgment of the shielding and dilution effect contributed by replacement fill. Based on this reasoning, SCA estimates the volume of soil needed to be removed would be reduced to about 470,000 cubic meters.[63] As noted above, the application of potassium may be an effective technique for reduction of exposure, but only up to certain concentrations of Cs-137. If that strategy is utilized in conjunction with soil removal, the volume of soil which would have to be removed is reduced to approximately 223,000 cubic meters.[64] This works out to a cost for soil removal of $22 million.[65]

While the material costs for application of potassium over the required amount of time are relatively modest, there are other associated costs. SCA reports:

> In addition to the basic cost of treating soil with potassium/fertilizer, a sound soil management program is imperative. For Enewetak

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[60] At Barnwell, South Carolina, (Claimants' Exhibit 46, Table 4-11, p. 4-34.)

[61] Dumped in the lagoon, (Claimants' Exhibit 46, Table 4-11, p. 4-34.)

[62] Entombed in a crater with concrete dome, (Claimants' Exhibit 46, Table 4-11, p. 4-34.)

[63] Claimants' Exhibit 45, Case #2, Table 14a, p. 54.

[64] Claimants' Exhibit 45, Case #3, Table 14a, p. 54.

[65] Claimants' Exhibit 45, Case #3, Table 14b, p. 55.

> Atoll, such a program would require the full-time oversight of a qualified agronomist and the support of at least two field technicians. All soils would be subjected to standard tests that ensure the proper soil treatment quantities of potassium or potassium fertilizer. More importantly, all soil and food crop samples would also be subjected to radioanalytical tests that assess the persistence of Cs-137 in soil and in food crops and provide quantitative data for demonstrating the effectiveness of suppressing plant uptake of Cs-137.
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> As a final test for ensuring the effectiveness of Cs-137 in food crops, the resettled population group would be requested to undergo an annual in vivo-bioassay (i.e., whole body count with potential urinalysis).[66]

These costs are imperative to insure the safety of the returning residents and are properly included in the cost of cleanup. Both SCA[67] and Enviropro[68] agree that the length of time for application of the potassium treatment would be on the order of 100 years. SCA estimates the present day cost[69] of potassium treatment

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[66] Claimants' Exhibit 46, p. 4-46.

[67] "Due to the 30 year half-life and persistence of Cs-137 in the soil, soil treatments may be required as long as 100 years." Claimants' Exhibit 46, p. 4-39.

[68] "Our assessment indicates that the technology will require implementation betweeen a minimum of 64 years and a maxium estimate of 127 years." Defender of the Fund's Exhibit XXX, p. 52.

[69] The hundred year cost is discounted at 7% per year.

in Enewetak over this time period would be $15.5 million.[70]

A necessary component of the clean up effort is radiological surveys. While past surveys at Enewetak have gathered much data, they are neither current, nor complete in regard to the support of the clean up effort. A characterization survey consisting of field measurements and laboratory analysis is required to provide information as to the exact location and nature of the contamination to allow compliance with guideline levels. An on-going remedial action support survey will be needed to support the clean up effort while it is being performed. Finally, a survey to insure that areas subjected to remediation have met required clean-up levels must be conducted. The cost of these surveys is $4.51 million.

As noted above, a major component of the cost of soil removal is disposal. The parties considered a number of disposal options, including lagoon dumping, ocean dumping, disposal (with no waste stabilization) on an uninhabited island in the atoll, use of contaminated soil as back fill to extend atoll land mass, construction of a causeway, crater entombment, and disposal in the U.S. SCA provides unit cost estimates for each of these alternatives.[71] Enviropro determined the cost under four different disposal scenarios: two causeway scenarios—direct fill and cement mix; dumping in the Marianas Trench; and shipping the soil to Nevada for storage. While it is difficult to directly compare the two parties' expert analyses, it may generally be observed that disposal in the U.S. will be more expensive than local dis-

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[70] Claimants' Exhibit 45, Table 27, p. 85.

[71] Claimants' Exhibit 45, Table 22, p. 74.

posal of the contaminated soil. Additionally, while dumping the contaminated soil in the lagoon may be the most inexpensive alternative, it may be ruled out on the basis of legal and political concerns about ocean dumping of radioactive waste. The same is true of dumping in the Marianas Trench.

While Enviropro sets out its conclusions relating to costs, the basis for its calculations were not set out in the Report, nor were they adequately explained in testimony at hearing. In contrast, SCA provided the background for determining costs through the unit cost methodology, basing its calculations on established, cited references. The calculations were reinforced through testimony, subject to cross examination, at hearing.

While the causeway alternative is not the least expensive option, it more fully protects the residents from risk of harm from exposure to radiation compared to other feasible local disposal options. The major pathway for exposure is ingestion of foods, particularly plants, which have absorbed radioactive substances from the soil. A causeway would separate the contaminated soil from agriculturally productive areas, protecting the people from exposure. While the option of on site disposal at an uninhabited island of the atoll may be less expensive, no site has been identified that would be appropriate on Enewetak or where the land owner would consent to such disposal. In the estimates of cost for such disposal, no component for compensation to the landowner for use of the land was identified. Finally, it is clear that such option is not the preferred disposal option of the people of Enewetak.[72] While such prefer-

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[72] "A third on-island disposal option that has the support of the Enewetak people and is recommended by the authors of this

ence is not dispositive in consideration of disposal options, it is a factor to be considered. Crater entombment may have the virtue of precedent behind it, but rather than enhance the productivity of the community, as in the case of the causeway, it requires a site which would be withdrawn from potential productivity. Like the use of an uninhabited island, no site has been identified, nor has the cost of compensating landowners been addressed. The cost of this option, $84.7 million[73] is more than that of the causeway option favored by the Enewetak people. The Tribunal finds that the most effective disposal alternative is the causeway option, at a cost of $31.5 million.[74]

Although the primary radioactive isotope of concern is Cesium 137, on the island of Runit (the fifth largest island of the atoll), there is residual Plutonium 239, resulting from the Fig and Quince tests conducted there. Radiation levels on Runit exceed the limit and it remains quarantined from use by the people of Enewetak. Techniques now exist to clean up this plutonium, utilizing soil sorting methods applied at Johnston Atoll, and dissolving the coral soil to separate out the Plutonium for disposal. The cost of this is $10 million.[75]

E. Soil Rehabilitation and Revegetation

In addition to the costs of removal of contaminated soil and its disposal, the land must be restored to pro-

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statement is the use of excavated soil in the construction of a causeway." Claimant's Exhibit 45, p. 74.

[73] Claimants' Exhibit 45, Case #3, Table 14b, p. 55.

[74] Claimants' Exhibit 45, Case #3, Table 14b, p. 55.

[75] Claimants' Exhibit 45, p. 102.

ductivity. The backfill provided to replace removed soil would be dredged from the lagoon and would not contain sufficient organic material to be agriculturally productive. Enviropro acknowledges the problem, but does not provide any specific remedy, other than to note it will take 25-50 years for the land to become fertile.[76] Claimants offer two options to rehabilitate the soil. One is to import topsoil from off island, potentially Kosrae or Ponape. The unit cost would be $40,062/acre. The other is to rehabilitate the soil through agricultural means as described by Mr. Mateariki, in his report filed as an exhibit in this action[77] and in testimony before the Tribunal. This approach would restore the soil through natural means, utilizing local resources and involving land owners and a local work force. The method has been tested by Mr. Mateariki on Enewetak. The unit cost for this approach is estimated to be $29,000 per acre, although it is acknowledged that it would take up to 50 years to completely restore the land to the level where it is self sustaining.[78] However, the import option would not include the cost of revegetation or maintenance and care. Additionally, there is the concern that imported soil may introduce foreign pests or plants inappropriate to the Enewetak ecological system. The cost for soil rehabilitation and revegetation of affected lands is the $17.7 million requested by claimants.[79]

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[76] Defender of the Fund's Exhibit XXX, p. 49.

[77] *Initial Report*, Teairki F. Mateariki, Claimants' Exhibit 130.

[78] Claimants' Exhibit 45, p. 94.

[79] Claimants' Exhibit 210.

F. Resettlement

The parties take divergent views of resettlement as an element of compensation in this claim. Claimants' position is that the requested resettlement costs

> ... are crucial to put the Enewetak people in a situation similar to their situation prior to their relocation in 1947. They are unable to engage in their traditional economic activities (copra production, fishing, agricultural exports, etc.) Because of the residual radioactivity on their atoll and the perception in the marketplace that it is contaminated. Until the soil rehabilitation and revegetation is complete (a process that will take decades), the Enewetak People have no means to pay for housing and other infrastructure necessary to enable them to live. Their protracted exile on Ujelang also prevented them from engaging in any economic activity, and thus precludes them from being able to pay for any of the necessary resettlement costs.

The cost of this resettlement, by claimants' calculation, is over $52 million.[80] This would provide for residences and community infrastructure on Enjebi Island (once it has been restored to radiological safety) and additional upgrade of facilities on Enewetak, Medren and Japtan Islands. The Enjebi portion of the plan includes 100 residences which would consist of masonry construction, treated wood roof trusses with aluminum

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[80] Claimants Exhibit 137, *Enewetak Atoll Revised Master Plan Concept for Enjebi Island and Upgrade and Restoration of Facilities at Enewetak, Medren and Japtan Islands*, prepared by E.P.G. Corporation.

roofing, three to four bedrooms, two internal baths, an interior kitchen, a septic system, a water storage system, a water connection to the central distribution line, a connection to the central power plant and a salt water flushing system. There would be a central power and water plant with two 250 KW generators and two 5,000 gallon per day water makers. A power distribution system would carry electric power to residences and service areas. There would be a water storage and distribution system including two 50,000 gallon lined concrete tanks, and a fuel storage facility consisting of two 20,000 gallon diesel tanks and one 10,000 gallon mogas tank, as well as a dispensing facility at the storage area. The community infrastructure would include a 4,000 foot compacted coral runway and a new LCU ramp at the dock area. The resettlement costs include a 4,000 square foot maintenance building, a 4,000 square foot warehouse, an 864 square foot airport terminal, a 1,152 square foot port control and communications building and a 5,000 square foot field station. Also included are a number of community buildings: a 2,400 square foot council house, a 3,200 square foot multi-purpose building for community activities, a 6,000 square foot school, a dispensary, a church, a public safety building[,] a recreation facility (outdoor basketball court, softball field, volleyball court, and soccer field), and a 6,500 square foot staff and visitors complex consisting of an eight unit apartment complex.

Although housing and facilities on the southern islands were provided in 1980, claimants assert a general upgrade and restoration of these is required as part of resettlement. This includes expanded power and water services to all residential areas, improvement of the airport, docks and fuel storage systems. The 116 houses completed in 1980, as part of the original reset-

tlement program will require $25,000 in repairs and upgrades including repair of walls, doors and windows, new roof coating, and a new kitchen and bath.

In response, the Defender of the Fund argues that "Resettlement costs are equivalent to the replacement value of the item at the time and place of destruction and nothing more."[81] While no evidence has been introduced as to the value of community residences and facilities in 1947 when the people of Enewetak were removed, it seems evident that value would be considerably less than the costs of resettlement set out by Claimants. This difference in approach springs from a differing understanding of what restoration entails. Claimants' position relies upon a view that restoration is not limited to a restoration of the physical conditions that existed at the time of their relocation in 1947, but rather must be extended to consider the economic condition of the community as a whole. The goal of restoration, in addition to environmental rehabilitation, must be "to create the infrastructure and conditions that will allow the Enewetak People to pursue economic opportunities with about the same possibility of success as they had prior to their relocation."[82] The Defender of the Fund takes a much narrower view, asserting that the resettlement costs are limited to replacement of those structures which were present at the time of relocation.

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[81] POSTHEARING SUBMISSION RE: VALUE OF UJELANG; AWARD OF RESETTLEMENT COSTS OF ENEWETAK ATOLL, filed November 11, 1999, p. 2.

[82] POSTHEARING SUBMISSION OF THE PEOPLE OF ENEWETAK ON (1) THE VALUE OF THE USE OF UJELANG AND (2) LEGAL AUTHORITY FOR RESETTLEMENT COSTS, filed November 11, 1999, p. 11.

Little evidence has been introduced on the exact status of the Enewetak people immediately preceding their relocation. In arguing for significant resettlement costs, claimants allow the inference that they were a self-sufficient, subsistence based community in 1947. However, what evidence is available suggests that the community was in a poor, dependent condition following the hardships of war time control by the Japanese and subsequent liberation after the U.S. invasion. Dr. Carucci reports:

> Local people were thankful to be alive after surviving the strafing and invasion of the atoll. They were fed and given clothing. But, in the descriptions of Ujelang residents in the 1970s, the war did not end on Enewetak. Local people were also placed in exile on the small islet of Aoman in order to allow the United States to continue their use of the main islets of Enewetak. Subsequently they received permission to expand their settlement to the neighboring islet of Bijili and to fish the waters along the northern fringe of their own atoll. ... In comparison to the times that would follow, this era is recalled in relatively positive terms. People were fed, clothed and given tools and materials to build homes and canoes. Yet, people did not control their own lives. They could not sail from place to place at will. They could no longer fully subsist on their land. Indeed, the very shape of that land changed shape...[83]

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[83] Claimants' Exhibit 147, p. 10.

This calls into question the baseline for establishing restoration.

The Tribunal agrees with claimants that the economic situation of the community is an important element of consideration in the overall structure of compensation in this case. However, it disagrees that this element of damage should be addressed through the type of resettlement costs proposed by claimants. The economic values inherent in the request for claimants' resettlement costs are addressed through the award for loss of use. As stated in the joint appraisal report, the loss of use value addresses "compensation for the economic loss to the people of Enewetak for the period that use of their land has been denied."[84] Claimants assert they have no way to pay for housing and other infrastructure because their exile on Ujelang denied them the opportunity to conduct economic activity and thus precludes them from paying resettlement costs. This acknowledges that in the absence of this denial of economic activity, the people would expect to pay for their own housing, as is the normal course of events. The loss of use award provides compensation for this loss of economic opportunity. While the lands of the atoll may not be fully productive, claimants' award for loss of use includes compensation not only for past loss, but also for loss of future use. To allow additional compensation for resettlement costs on the order of those requested by claimants would amount to a duplicative award.

Claimants argue that these costs have already been approved by the U.S. and that consequently sets the legal standard for resettlement costs. However, to the

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[84] Joint Appraisal, p.4.

extent that the resettlement program is an element of the overall U.S. program of direct compensation to the Enewetak people, that approach does not include compensation identified for denial of use of the land by the people. The two approaches are exclusive of each other, at least to the extent that resettlement is proposed by claimants. Claimants may not receive compensation for the economic loss attendant to the denial of use of their land, and then receive resettlement costs which are justified by those same economic losses.

G. Restoration Damages

To summarize, the reasonable costs of clean-up and rehabilitation are as follows: soil removal—$22,500,000; potassium treatment—$15,500,000; soil disposal (causeway)—$31,500,000; Fig/Quince clean-up—$10,000,000; surveys—$4,510,000; soil rehabilitation and revegetation—$17,700,000.

The sum of these is $101,710,000. This total must be adjusted by the amount of the Enjebi Trust Fund, which the parties stipulated to be $10,000,000. Restoration damages for clean up and rehabilitation of Enewetak total $91,710,000.

V. Hardship

The Tribunal heard compelling testimony from individual members of the Enewetak community about the relocation to and conditions on Ujelang. In April of 1999, the Tribunal heard testimony of community members specifically addressing the hardships on Ujelang. Those testifying included Samson Yoshitaro, James Gideon, Ms. Rennie Robert, and Senator Ishmael John. The Tribunal also heard from Dr. Laurence Carucci, for the claimants and Dr. Nancy Pollock, for the Defender of the Fund. The Tribunal also heard from Mayor Nep-

tali Peter, Councilman James Gideon, Obed, and Yoshitaro Elijah in January of 1997. Although the 1997 hearing was addressing the loss of use issue, some of the testimony related to the time on Ujelang.

The witnesses painted a bleak picture of conditions on Ujelang, particularly from the early 1950's until the 1970's. Dr. Carucci notes:

> There are a number of forms of evidence that show how serious the suffering was on Ujelang during these years. First, are many similar versions of the stories that elders told on the atoll in the mid-1970's. While stories of suffering are virtually innumerable, those that are repeated again and again focus on a number of core incidents including famine and hunger, near starvation and death from illness, food shortage and the limitations of the environment on Ujelang (fishing/collecting), the polio epidemic, the measles epidemic, the rat infestation, the time of the strike, and easing of suffering during the 1970s but with continued homesickness and desire to return to Enewetak.[85]

The testimony of the witnesses reinforced this broad statement. Samson Yoshitaro told of the food shortages, how there was so little food and supply ships so infrequent that they were forced to harvest immature pandanus and breadfruit and eat the relatively small amounts of copra they had produced for sale. He told how they had no breakfast, would gather what they could for lunch and have fish and arrowroot for supper. He also related how there were so many rats

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[85] Claimants' Exhibit 147, p. 14.

that the people competed with rats for food, and that the rats would "eat your hands." James Gideon told how so much time was spent in the lagoon getting food, mainly clams, that men's hair turned reddish.[86] He told how the copra was eaten by rats because it was so long between field trip ships. Ms. Rennie Roberts testified how the women had to use flour sacks for clothes. She lived in both Arno and Ujelang as she grew up and she found greater hardships on Ujelang. She told of the polio epidemic in 1956 and 57, which she learned of from her parents and grandparents. Some mothers had to nurse two children because one mother would have no milk. Senator Ishmael John testified how the people didn't want to go from their homeland to Ujelang when they were relocated. In the early years there was not a food shortage, even though the ships were infrequent. The shortages started in 1956. From 1956 to 1972 was the worst suffering. Dr. Carucci[87] relates the following from a woman in her forties, told to him in 1978, near the end of a food shortage. Although lengthy, it is recounted in full to capture the fullness of the hardship experienced by the people:

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[86] Dr. Carucci notes that while the people attributed this reddish-blondish hair coloring to too much time in the sun, the discolored, frazzled appearance is characteristic of malnutrition. Claimants' Exhibit 147, p. 19.

[87] Dr. Carucci has spent four years residing with Enewetak and Ujelang people conducting research. A portion of that time was spent on Ujelang in the late 1970s. He notes that "the stories Enewetak people today tell of suffering on Ujelang, ... lack the kind of depth, elaboration, and emotion that stories of the same events had in the 1970s. And, of course, this is because the experiences of those events are far more remote [today] than they were in 1976-78. At that time, people still knew what it was like to be hungry." Claimants' Exhibit 147, p. 15.

We, perhaps we (endeared, inclusive) are very hungry now with people sailing here and there throughout the atoll to search for food, and with everyone digging arrowroot, consuming *pikukkuk* (an arrowroot-based Wojlan food), and scraping coconuts too unripe for harvesting from their shells with their teeth (because the copra-stage coconuts are gone), and with everyone eliminating shit so watery it evaporates or seeps into the sand, with many people sick and some of the babies nearing death, but things are still O.K. The young ones call this a famine (*nita*), but in comparison with the times of the past, this is just a severe hunger.

(Meditates) ... Those times previously were difficult days on Wojlan, for then, the times of hunger, of real famine, were more frequent than the times of health. God have mercy on us (*kapokwekej*). Many children and old ones died as a result of those times of danger. Tebij, the man who is the grandfather of Paul and Mahten, well, he was one of those who died on account of the famines. And infants, well there were so many who disappeared (died), you could not count them. Their stomachs stuck out like they were bloated, and you would never think that they were hungry. Full; as you looked at them you would think they were very full. But, in fact they were hungry. And their stomachs were soft all the time, and when they deficated, it was just water, hot foamy water that winnowed away into the sand. Just like nowadays. But they would get hot fevers, then cold chills; hot fevers, then cold and sweaty. And then, in just a moment, they would be gone. Dead, they would

never move again. Their life was gone. And, in those days, the wailing across the village was constant. We grieved, but there was hardly time to feel sorry for those who died, for we had to try harder and continue working or else all of the others would die as well.

So, you see, when Tebij died, some members of his family had to pause and prepare for the funeral. Some women grieved, and a few of the men had to dig the grave. But, at the same time, while the men dug, others had to remain in the sea and collect food. They had to redouble their labors because they would then fish for themselves and their own family as well as for the family of that other one, the one who had died. And, as you know, they were already in the sea from some time prior to the appearance of the sun until the sun once again dove (into the sea in the evening). There was no breakfast. The children would wake up crying, and they would never stop crying on account of their hunger. They would scrape coconut with their teeth until their stomachs were slightly filled but, at times, even the supply of coconuts were exhausted. You could scrounge around Jabonbok (the windward-most tip of Wojlan) until you were exhausted and find only one, perhaps two. Even the immature copra-stage nuts on the tallest coconuts in Jabonbok were gone, for the young men had already climbed them and stripped away their fruits.

And so, the infants would just cry, because there was no milk at their mother's breasts. Only the smallest quantity (of milk), but it was of no use because it was so watery—like rain-

> water. And the women would have to *aojek*, make an arrowroot-based jello, often just with water because there were no drinking coconuts, just to keep the infants from crying. If it was a good day, perhaps a woman's husband would come home by noon with a few fish, or if (he) had bad luck, perhaps a few clams. And, as you know, during these times of famine, fishing is very difficult. Everyone is in the sea from morning until night, and even on Ane-manot or Kalo (the islets furthest from Wojlan islet) there are inadequate numbers of fish. And even the fish that remain are easily frightened.[88]

These hardships were confirmed by the Defender's witness, Dr. Pollock. She notes in her report submitted to the Tribunal, about the period from the mid 1950s to 1971:

> It was a phase of great hardship for the people living on Ujelang. They experienced crop failures, shortage of fish in the lagoon ... The infrequency and irregular field trip ships to buy their copra and sell them the food so badly needed was the second major concern reported ... Their ability to purchase supplementary food was thus virtually non existent. "They were on the verge of starvation" [citation omitted]. As the population grew and field trip ships became more infrequent, so their plight increased through to 1971.[89]

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[88] Claimants' Exhibit 147, pp. 15-16.

[89] *A Perspective on Cultural Loss by the Enewetak People*, by Dr. Nancy Pollock, Defender of the Fund's Exhibit WW, p 4.

Although the hardships associated with the relocation of the people of Enewetak to Ujelang have been characterized as "discomfort and annoyance" to be consistent with the formulation for compensation in the Second Restatement of Torts, it is clear that the conditions suffered by those relocated go far beyond simple annoyance. The Defender of the Fund has suggested that this category of damage would be more appropriately addressed through the Tribunal's personal injury program. The Tribunal disagrees. The Tribunal has previously stated in ruling on the Defender's MOTION TO LIMIT CATEGORIES OF DAMAGE in this case that:

> To the extent that these damages are the result of damages to property and arise out of a loss of use to that property, they are properly considered as consequential damages. We see, in general, the damages related to relocation as falling with in this category. However, to the extent that such personal interest damages may otherwise result from the Nuclear Testing Program, such as a medical condition caused by exposure to radiation from the tests, we agree with the Defender that they should properly be pursued through a Section 23(13) or (14) action.[90]

This class action is the appropriate vehicle to address these damages because it is so closely related to the underlying subject matter of land damages. These damages, which were suffered on a community wide

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[90] DECISION AND ORDER, In the Matter of the People of Enewetak, NCT No. 23-0902, August 11, 1995, pp. 8-9.

basis differ from those typically addressed in the personal injury program, which are basically radiogenic diseases, linked to exposure to radiation from the testing program. The injuries at issue here are those arising out of the relocation to Ujelang and the hardships endured there by the people because of its remoteness and lack of adequate resources to support the population sent there. The damages are a consequence of the loss of their land and their relocation attendant to that loss. Further, it makes sense from the point of judicial economy to consider these damages with the land damages because they arise out of the same factual situation and involve the same community of claimants. Finally, based upon the NCTA, any award of this nature for personal injuries would be made to the local distribution authority[91], which will determine an appropriate distribution of the award.

The Tribunal will adopt the approach suggested by claimants for quantification of these damages, by paying an annual amount for each person on Ujelang for each of the thirty three years between 1947 and 1980 the people of Enewetak were on Ujelang. The population numbers are those set out in Claimant's Exhibit 203. Although these numbers reflect projections, they are based on data collected by Dr. Carucci, as explained in his testimony, and reflects the best numbers available to us. In determining the annual amount, it must be acknowledged that not all people suffered the same degree of hardship (as revealed by the dietary information set forth by Dr. Carucci and Mary Maifeld,)[92] and

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[91] 42 MIRC 123(17)(b)(iii).

[92] Claimants' Exhibit 147.

the level of hardship was not uniform over the period of years the people of Enewetak were residing on Ujelang. Nonetheless, it is clear that the remoteness of Ujelang, the relative lack of resources and scarcity of food, and the separation from the people's traditional homeland were all factors that the population on Ujelang shared. The Second Restatement on Torts requires damages to be established with certainty.

> One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.[93]

Under the unique circumstances of this claim, the requisite certainty has been met. Those circumstances include the length of time that has passed between the time of the harm and the opportunity to present evidence on that harm and the fact that the delay was not the fault of the people of Enewetak. Another factor is the statutory framework under which their claim is being heard.

In determining the amount of compensation for these sufferings, the Tribunal has considered not only the cases cited by counsel, but also the Tribunal's personal injury program. Under that program, the maximum award for a claimant is $125,000 for serious medical conditions most likely to lead to death. In order to be fair and consistent to all personal injury claimants, an individual should not receive hardship damages which exceed this amount.

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[93] *Restatement on Torts Second*, Section 912.

As has been described by the witnesses, the relative hardships suffered on Ujelang varied with time. However, there was general agreement that the period of approximately 1956 to 1972 was the period of greatest suffering. For this period of 16 years, an annual per person amount is determined by the Tribunal to be $4,500. For the remaining 17 years, preceding and following this period, the annual amount is $3,000. This means that an individual who was present on Ujelang for all thirty three years would receive $123,000. The Tribunal acknowledges that this amount is somewhat arbitrary and cannot fully repay those who suffered on Ujelang. The Tribunal can only echo the court in *Mochizuki v. US*:

> No compensation is ever equivalent to a serious human loss. Who among us would ever trade our eyes or legs for $5,000 or $20,000 o[r] a hundred times that much? Money damages can never undo the loss of life, false imprisonment or the passage of years. Money, however, is the medium which the law must use as it seeks to []right the wrongs. It must use this medium with the full recognition that it is never truly adequate.[94]

Based upon the annual population figures for thirty three years, starting in 1947 and ending with the return to Enewetak in 1980, and the appropriate per annum amount, the damages for the hardships during the relocation to Ujelang amount to $34,084,500.

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[94] Mochizuki v. US, 43 Fed.Cl. 97 (1999) at p. 97.

VI. Conclusion

With this decision, the Tribunal makes its first award for damages to property. Through the process, the Tribunal has heard testimony from the people of Enewetak and from expert witnesses from both Claimants and the Defender of the Fund. It has reviewed voluminous reports and documents. It has had the benefit from the arguments of counsel. The Tribunal has determined that the people of Enewetak, the claimants in this case, have suffered loss and injury to their property and to their persons. While the Tribunal is charged with the determination of these damages, the claimants have suffered damage beyond that which money can compensate. The destruction and disruption of their community and the attendant life style and values cannot be compensated with an award of dollars. The passage of time and changes in culture preclude a return to the way things were half a century ago. While that which was lost may be priceless, it does not mean it was without value; nor does it justify an award which is not firmly based in fairness and reasonableness.

The Tribunal has determined the amount of compensation due to the claimants in this case is **$324,949,311**. This includes $199,154,811 for past and future loss of use of Enewetak Atoll to claimants. It further includes $91,710,000 to restore Enewetak to a safe and productive state. Finally, it includes $34,084,500 for the hardships suffered by the people of Enewetak as a result of their relocation attendant to their loss of use.

ORDER

Based on this decision, it is hereby ORDERED that a hearing shall be set for post-judgment proceed-

ings, including a determination of annual funding pursuant to 42 MIRC 123(17)(b)(iii)(B).

Dated this 13th day of April, 2000 at Majuro, Marshall Islands.

/s/ Oscar De Brum
OSCAR DEBRUM
CHAIRMAN

/s/ Gregory J Danz
GREGORY J DANZ
MEMBER

/s/ James Plasman
JAMES PLASMAN
MEMBER

NUCLEAR CLAIMS TRIBUNAL
REPUBLIC OF THE MARSHALL ISLANDS

NCT No. 23-0902

IN THE MATTER OF THE PEOPLE OF ENEWETAK, *et al.*,
CLAIMANTS FOR COMPENSATION

ORDER

On April 13, 2000, the Tribunal issued a MEMORANDUM OF DECISION AND ORDER in this claim, determining that the amount of compensation due to the people of Enewetak for damage to property resulting from or arising out of the U.S. Nuclear Testing Program was $324,949,311. This amount included $17.7 million for soil rehabilitation and revegetation of affected lands. On April 26, 2000, Claimants filed a MOTION TO AMEND MEMORANDUM OF DECISION AND ORDER FILED ON APRIL 13, 2000, requesting the Tribunal include in its determination the entire costs necessary to rehabilitate all the lands on Enewetak. Based upon the amount and the exhibit cited by the Tribunal in its MEMORANDUM OF DECISION, Claimants assert that the $17.7 million identified by the Tribunal included amounts only for soil rehabilitation and revegetation of the southern islands and 392 acres of the northern islands where no soil scraping is required for radiological clean up. The lands which will require removal of contaminated soil will require an additional $16.1 million for soil rehabilitation and revegetation.

Because of the manner of presentation of the costs of rehabilitation in Claimants' exhibits, the Tribunal did not include the funds necessary for soil rehabilitation and revegetation for those lands where soil removal is a

part of the restoration methodology. It was the intent of the Tribunal to include an amount sufficient to restore the lands of Enewetak to productivity. In some sense, these lands are where the need for soil restoration and revegetation is most compelling.

The Defender of the Fund filed a "non-opposition" to Claimants' motion on May 3, 2000.

THEREFORE, it is hereby ORDERED, that the Tribunal's MEMORANDUM OF DECISION AND ORDER of April 13, 2000 is AMENDED to include an additional $16.1 million as the cost to restore the soil and revegetate the 558 acres subject to soil removal as part of the radiological cleanup, thus bringing the total amount of damages to $341,049,311.

Dated this 5th day of May, 2000.

/s/ Oscar De Brum
OSCAR DEBRUM
CHAIRMAN

/s/ Gregory J Danz
GREGORY J DANZ
MEMBER

/s/ James Plasman
JAMES PLASMAN
MEMBER

NUCLEAR CLAIMS TRIBUNAL
REPUBLIC OF THE MARSHALL ISLANDS

NCT No. 23-0902

IN THE MATTER OF THE PEOPLE OF ENEWETAK, *et al.*,
CLAIMANTS FOR COMPENSATION

ORDER

On April 13, 2000, the Tribunal issued its DECISION AND ORDER in this claim, awarding damages in the amount of $324,949,311. In that decision, the Tribunal ordered a hearing be set for post judgment proceedings. On April 26, 2000, claimants filed a MOTION TO AMEND MEMORANDUM OF DECISION AND ORDER, requesting the inclusion of certain rehabilitation costs. The Defender of the Fund did not oppose this MOTION and on May 5, 2000, the Tribunal issued an ORDER amending its April 13 DECISION to include an additional $16.1 million for soil rehabilitation and revegetation. On May 26, 2000, a hearing was held and a briefing schedule established for examination of the outstanding issues of post-judgment interest and attorneys fees and costs. The parties filed their respective briefs in a timely manner and on June 6, 2000 filed a stipulation dealing with future loss of use, prior compensation, and prejudgment interest. At the Tribunal[']s request, the parties filed on July 21, 2000, a REVISED STIPULATION RE FUTURE LOSS OF USE, PRIOR COMPENSATION AND INTEREST.

Stipulation

The parties offered a REVISED STIPULATION RE FUTURE LOSS OF USE, PRIOR COMPENSATION, AND INTEREST, filed July 21, 2000 to address

certain issues in the Tribunal[']s decision. The stipulation as to future loss of use incorporates a calculation which utilizes total of 1104.16 acres as opposed to the 1305.78 acres employed in the appraisal initially submitted to the Tribunal. This change reflects the parties['] agreement as to the proper acreage which will be denied to claimants['] use in the future. The prior compensation portion of the stipulation reflects the inclusion of certain annual payments under the Section 177 Agreement ($3.25 million received by claimants in 1997, 1998, and 1999) which were not included in the calculations adopted in the Tribunal[']s April, 2000 DECISION. In the April 2000 DECISION, the Tribunal determined the value of the future loss of use (adjusted for Section 177 payments) to be $50,154,811. Based upon the STIPULATION, this value would change to $47,001,908.[1] The bases of the stipulation are reasonable and will be adopted.

The final portion of the STIPULATION relates to pre-judgment interest, from the date of the loss of use calculation, January 24, 1997, to the date of entry of the decision, April 13, 2000. The rate of interest agreed to by the parties was 7 percent. The amount of interest to which the parties stipulated was $47,681,122. The inclusion of interest to the date of the decision is appropriate and consistent with the methodology utilized by the parties in assessing the loss of use to claimants.

Attorneys Fees

This issue was extensively briefed by the parties in 1995. The Tribunal[']s ORDER of December 7, 1995

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[1] Present value of future rents ($60,387,552) less present value of future Section 177 payments ($13,385,644) as of January 1997.

addressed the matters raised in claimant[']s MOTION for attorneys fees and costs filed June 19, 2000. The December 1995 ORDER allowed the Claimants to introduce evidence relating to attorneys fees incurred by the People of Enewetak in the prosecution of their claims against the U.S. for damages from the U.S. nuclear testing program in the Pacific before the U.S. Court of Claims prior to the effective date of the Compact of Free Association. Claimants have been unable to develop evidence to support this part of the claim in the time since that ORDER and the Tribunal does not believe that additional time will reasonably lead to the discovery of additional evidence supporting this aspect of the claim. The Tribunal further declines the invitation to award attorneys fees for attorneys fees before the Tribunal prior since its inception and prior to the amendment to the Nuclear Claims Tribunal Act by P.L. 1993-56, which removed the authority of the Tribunal to award attorneys fees.

Post-Judgment Interest

It seems clear that were this a determination of just compensation in a taking action against a governmental body, post judgment interest would be awarded. However, as noted in the Tribunal[']s DECISION AND ORDER of April 13, 2000, while principles of just compensation may be referenced in determining what is necessary to make claimants whole, this is not an eminent domain proceeding. []Neither the U.S. nor RMI government is a party to this action, and consequently certain elements in a determination of just compensation are not present. (MEMORANDUM OF DECISION AND ORDER, April 13, 2000, p. 3)

The Tribunal, in making its award of damages, has evaluated the harm suffered by claimants and issued an

award. The funds available for payment of that award are far short of the amount awarded. Assuming the existing compensation framework, payment of award would be made over a period of years from the annual proceeds of the Section 177 Fund. Even under the most optimistic of scenarios, with the funds currently available, full payment of the award would take over 100 years. Unlike a just compensation case where the award may be enforced against a governmental entity, the Tribunal has a limited fund and an award of interest could arguably only dilute further the funds available for payment.

An award of interest in this case could be seen to work unfairly toward personal injury award recipients to whom interest is not awarded. Because of the structure of the funding mechanism, the Tribunal is forced to make pro rated payments of awards from the annual proceeds of the Fund. If post judgment interest were to be a component of these payments, the administrative burden of constantly recalculating unpaid awards would be significant.

Nonetheless, it is clear that whatever the value of the award, it will decline over time as inflation takes its toll. In the absence of post judgment interest, claimants who receive property damage awards at different times will be unequally treated in that the value of the later awards will be greater due to the passage of time and effect of inflation. If funds were available to pay property awards upon their entry, this would not be a problem. However, the longer it takes to make final payment, the less the actual value of the award. The absence of post judgment interest would have the effect of penalizing claimants who receive an award earlier than those who come later in the process. While it could be argued that personal injury defendants may be

unfairly treated if property claimants[']awards include a post judgment interest component, there are some significant differences between the personal injury awards and property damage awards.

Property taken by the government without just compensation is subject to constitutional remedies. Personal injuries by the government are not similarly protected. Recipients of personal injury awards from the Tribunal have been the beneficiaries of a statutory presumption which relieves them of the burden of proving their injury was caused in fact by exposure to radiation from the nuclear testing program. The effect of this presumption is to be over inclusive, so that some of those receiving personal injury awards have suffered from injuries which were not in fact caused by the testing program. Property damage claimants, on the other hand, have met a heavier burden of proof in relating their damage to the effects of the testing program. Arguably the absence of post judgment interest is the price of the presumption.

The Defender of the Fund correctly notes that there is no specific statutory authority for including post judgment interest in the award. However, the Nuclear Claims Tribunal Act provides:

> In determining the proper award of compensation, the Tribunal or the Special Tribunal, whichever is the decision maker, shall, in accordance with Section 2 of the Section 177 Agreement, take into account the validity of the claim, any prior compensation made as a

result of such claim and such other factors as it may deem appropriate.[2]

In the case of property damage claims, the Tribunal deems the inclusion of post judgment interest to be appropriate in the following manner. It will be applied to the loss of use and restoration portions of the award, but not the hardship portion of the award. The hardship damages, although arguably consequences of the damage to property, are more in the nature of personal injuries and not subject to the same considerations as those damages which are more closely related to a just compensation claim.

The possible inequities of post judgment interest between personal injury and property damage claimants will be addressed through the payment schedule. The total loss of use damages for past and future loss of use amount to $244,000,000,[3] while the total cost of restoration is $107,810,000.[4]

ORDER

1. The REVISED STIPULATION is accepted and the Tribunal['s] April 13, 2000 DECISION is AMENDED to reflect future loss of use damages of $47,001,908 rather than $50,154,811 and the addition of prejudgment interest in the amount of $47,681,122.

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[2] 42 MIRC 112.

[3] REVISED STIPULATION RE FUTURE LOSS OF USE, PRIOR COMPENSATION, AND INTEREST, filed July 21, 2000, Table 7A-2.

[4] This includes the $91,710,000 awarded in the April 13, 2000 DECISION, and the $16,100,000 from the Tribunal['s] May 5, 2000 ORDER, amending the April 13 DECISION.

2. Claimants['] MOTION for attorneys fees is DENIED.

3. Claimants['] MOTION for post judgment interest is GRANTED as follows: interest in the amount of 7% per year is awarded on the loss of use damages of $244,000,000 and on restoration damages of $107,810,000.

Dated this 3rd day of August , 2000.

/s/ Oscar De Brum
OSCAR DEBRUM
CHAIRMAN

/s/ Gregory J Danz
GREGORY J DANZ
MEMBER

/s/ James Plasman
JAMES PLASMAN
MEMBER

APPENDIX H

BEFORE NUCLEAR CLAIMS TRIBUNAL REPUBLIC OF THE MARSHALL ISLANDS

NCT Nos. 23-0902, 23-04134

IN THE MATTER OF THE PEOPLE OF ENEWETAK, *et al.*, CLAIMANTS FOR COMPENSATION

IN THE MATTER OF THE PEOPLE OF BIKINI, *et al.*, CLAIMANTS FOR COMPENSATION

Feb. 1, 2002

ORDER

This matter came on for hearing on January 30, 2002, before the full Tribunal. Present were Phillip Okney, Defender of the Fund, and Davor Pevec, counsel for the people of Enewetak. Jonathan Weisgall, counsel for the people of Bikini participated by telephone. Chairman deBrum was unable to participate for medical reasons and the parties consented to proceed in his absence.

The Tribunal had ordered the parties to address the following issues:

> 1. Does the Tribunal have the authority and duty to designate what portion of the award the annual payment is to address? Claimants have received an award for damages for loss of use, for rehabilitation and restoration costs, and for consequential damages. Some of these areas a[re] subject to post judgment interest. Is that a factor in the Tribunal's Order for annual payment?

2. Are these payments subject to requirements relating to distribution schemes for Local Distribution Authorities? The Defender has raised this issue in the past and it has never been specifically addressed by the Tribunal.

3. Are these annual payments subject to prorationing in the manner of other awards made by the Tribunal?

4. What should be the amount of the annual payment? It is clear that the Nuclear Claims Fund is insufficient to make more than a token payment on the awards. Nonetheless, the Claimants deserve a payment that will acknowledge the loss and damage from the Nuclear Testing Program which they have suffered and give some meaning to the Tribunal's award.

The parties, in their written submissions, agreed on the second and third areas of concern, that the payments were subject to distribution scheme requirements and prorationing. The Tribunal heard argument on the first and fourth questions. While the Defender has raised some significant issues in relation to the designation of categories of damage, in light of the amount of payment relative to the total awards in these cases, the Tribunal declines the invitation to make such designation at this time. The Tribunal believes it is more important to make some payment on these awards to give meaning to adjudicated damages suffered by the claimants in these two claims, even though the relative amount of payment is small. The Tribunal has determined to make an initial payment of awards in these claims based upon a pro rata factor of .25 percent. While the amount is less than requested by claimants, in light of the resources available to the Tribunal, the potential of future land awards and

uncertainty regarding the future of the Tribunal, the level of payment is an amount the Tribunal regards as prudent considering the totality of circumstances. Based on the NOTIFICATION OF AMOUNT DUE TO THE PEOPLE OF ENEWETAK AS OF JANUARY 28, 2002, the amount of the initial payment to the claimants in NCT No. 23-0902 is .25% of $431,500,000, which is $1,078,750.00. Upon submission of a similar calculation by the people of Bikini, their initial payment will be made. Payment will be made as soon as administratively possible, taking into account the need to draw down the funds necessary to make payment.

In light of these considerations it is hereby ORDERED:

1. Initial payments to claimants in these claims shall be determined on the prorate basis of .25 percent of the total compensation award of the amounts currently due to claimants in each claim.

2. Initial payment in NCT No. 23-0902 is $1,078,750.00.

3. The People of Bikini shall submit a calculation of amount currently due under the award in NCT No. 23-04134 within 30 days for determination of the amount of initial payment.

Dated this 1st day of February, 2002 at Majuro, Marshall Islands.

/s/_____
GREGORY J. DANZ
ACTING CHAIRMAN

/s/_____
JAMES PLASMAN
MEMBER

APPENDIX I

BEFORE NUCLEAR CLAIMS TRIBUNAL
REPUBLIC OF THE MARSHALL ISLANDS

NCT Nos. 23-0902, 23-04134

IN THE MATTER OF THE PEOPLE OF ENEWETAK, *et al.*,
CLAIMANTS FOR COMPENSATION

IN THE MATTER OF THE PEOPLE OF BIKINI, *et al.*,
CLAIMANTS FOR COMPENSATION

Feb. 4, 2003

ORDER

This matter came on for hearing on January 30, 2003 before the Tribunal pursuant to Claimants' requests for their second payments of Tribunal awards for damage to property resulting from the Nuclear Testing Program. Although these two cases had been consolidated for hearing on this matter, because of teleconferencing technical difficulties with both claimants' counsel being off-island, they were heard sequentially. Present in Majuro was Phillip Okney, Defender of the Fund. Davor Pevec, counsel for the people of Enewetak and Jonathan Weisgall, counsel for the people of Bikini, both participated by telephone.

The record revealed that both claimants had filed statements relating to distribution of last year's payment. Counsel presented argument going to the issue of the amount of payment that the Tribunal should make. The Tribunal note that the current Fund bal-

ance lies at approximately $12 million and that fixed costs between [illegible] and the end of [illegible] land payments for claimants in these two cases, or in the two pending class action property claims for Rongelap and Utrik. Legislative or administrative action could add significantly to the demands on the Fund. By the calculations of claimants, their unpaid awards, taking into account interest, amount to the following: NCT No. 23-0902 (People of Enewetak)—$454,986,118.00, NCT No. 23-04134 (People of Bikini)—$629,896,320.00. In light of the current fiscal constraints, it behooves the Tribunal to be conservative in its payment determination. In the personal injury scheme, [illegible] payments this year were set at fifty percent, while second year payments were twenty-five percent. The second year of property payments will reflect a similar decrease of one half the initial payment.

In light of these considerations it is hereby ORDERED:

1. Payments to claimants in these claims for this year shall be determined on the prorate basis of .125 percent of the total compensation award of the amounts currently due to claimants in each claim, based upon their respective NOTIFICATIONS, filed previously with the Tribunal in connection with their requests for second annual payment. In NCT No. 23-0902 (People of Enewetak), the annual payment is $568,732.65 In NCT No. 23-04134 (People of Bikini), the annual payment is $787,370.40.

2. Payment shall be made as soon as administratively possible, with due consideration being given to the need for the Fund Managers to draw down funds in a fiscally reasonable manner.

Dated this 4th day of February, 2003 at Majuro, Marshall Islands.

/s/_____
GREGORY J. DANZ
ACTING CHAIRMAN

/s/_____
JAMES PLASMAN
MEMBER

Nos. 09-498 and 09-499

In the Supreme Court of the United States

ISMAEL JOHN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PEOPLE OF BIKINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 1983, the people of the Marshall Islands approved by popular vote a Compact of Free Association between the Government of the United States and the Government of the Marshall Islands. As part of the Compact, the Government of the Marshall Islands espoused and settled claims of its citizens against the United States arising out of the nuclear testing program conducted in the Marshall Islands between 1946 and 1958. In the Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), Congress ratified the Compact's espousal provisions as a "full and final settlement" of all claims arising from the nuclear testing program, and enacted the Compact's provision that "[n]o court of the United States shall have jurisdiction to entertain such claims." The questions presented by this case are:

1. Whether the Compact of Free Association Act bars the Court of Federal Claims from exercising Tucker Act jurisdiction to entertain petitioners' suits seeking just compensation for alleged takings of property arising out of the nuclear testing program in the Marshall Islands between 1946 and 1958.

2. Whether a challenge to the Government of the Marshall Islands' espousal and settlement of petitioners' claims against the United States involves a nonjusticiable political question.

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In the Supreme Court of the United States

No. 09-498

ISMAEL JOHN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 09-499

PEOPLE OF BIKINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is published at 554 F.3d 996. The opinions of the Court of Federal Claims are published at 77 Fed. Cl. 788 (Pet. App. 11a-114a) and 77 Fed. Cl. 744 (09-499 Pet. App. 10a-107a).[1]

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 09-498.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. Petitions for rehearing were denied on May 27, 2009 (Pet. App. 115a-116a; 08-499 Pet. App. 108a-109a). On July 28, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including September 24, 2009. On September 14, 2009, the Chief Justice further extended the time to October 23, 2009, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Republic of the Marshall Islands (RMI) comprises 29 atolls and five islands in the Pacific Ocean. Pet. App. 2a. The Marshall Islands were formerly part of the Trust Territory of the Pacific Islands, which the United States administered pursuant to a United Nations-approved trusteeship from 1947 until 1986. See Trusteeship Agreement for the Former Japanese Mandated Islands (Trusteeship Agreement), Apr. 2, 1947, 61 Stat. 3301, 8 U.N.T.S. 189 (Pet. App. 281a-288a).

The trusteeship concluded with the adoption of a Compact of Free Association (Compact) between the Government of the United States and the Government of the Marshall Islands. See Compact of Free Association Act of 1985 (Compact Act), Pub. L. No. 99-239, § 201, 99 Stat. 1800 (1986) (Pet. App. 180a-248a) (setting out the text of the Compact). In September 1983, the people of the Marshall Islands approved the Compact in voting plebiscites monitored by observers from the United Nations. Compact Act preamble, 99 Stat. 1770 (Pet. App. 118a). In turn, Congress adopted and the President signed a joint resolution approving the Com-

pact, and the President duly proclaimed the Compact effective on October 21, 1986. Compact Act § 101(b), 48 U.S.C. 1901(b) (Pet. App. 124a); Proclamation No. 5564, 51 Fed. Reg. 40,399-40,400 (1986).

Among other things, the Compact settled claims against the United States arising from the nuclear testing program conducted in the Marshall Islands between June 1946 and August 1958. In Section 177 of the Compact, 99 Stat. 1812 (Pet. App. 204a-205a), and a subsidiary Agreement for the Implementation of Section 177 of the Compact (Section 177 Agreement), June 25, 1983, U.S.-Marsh. Is., Hein's No. KAV 1271 (Pet. App. 261a-279a), the Government of the Marshall Islands espoused the claims of its citizens and agreed to settle them.[2] The United States accepted the responsibility for various claims "owing to citizens of the Marshall Islands * * * resulting from the nuclear testing program," including claims "for loss or damage to property [or] person." Compact § 177(a), 99 Stat. 1812 (Pet. App. 204a). And the United States agreed to contribute $150 million to an investment fund to be administered by the RMI and managed by a professional fund manager, with the income and, if necessary, the principal to be disbursed for various purposes, including compensation for claims. Section 177 Agreement Arts. I-II (Pet. App. 262a-269a). The RMI agreed to establish a Claims Tribunal to decide claims "in any way related to the Nuclear Testing Program," including property claims, and to pay tribunal awards from the fund. *Id.* Art. II, §§ 6, 7(b), Art. IV, § 1 (Pet. App. 268a, 271a-272a).

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[2] The Government of the Marshall Islands represented in the Compact that it had "full authority" under the Constitution of the Marshall Islands to fulfill its responsibilities, including the espousal. Compact § 471(a), 99 Stat. 1834 (Pet. App. 246a)

The Section 177 Agreement also included a provision entitled "Changed Circumstances" that authorized the RMI to petition Congress for additional funds under specified conditions. Section 177 Agreement Art. IX (Pet. App. 276a). The agreement specified that "[i]t is understood that this Article does not commit the Congress of the United States to authorize and appropriate [such additional] funds." *Ibid.*

To effectuate the settlement, the Compact itself, the Compact Act, and the Section 177 Agreement all provided that the settlement would serve as the final and unreviewable resolution of any claim that the people of the Marshall Islands might have against the United States. See Section 177 Agreement Art. X, § 1 (Pet. App. 276a) ("This Agreement constitutes the full settlement of all claims, past, present, or future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States"); *id.* Art. XII (Pet. App. 278a) ("All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims"); Compact Act § 103(g)(1), 48 U.S.C. 1903(g)(1) (Pet. App. 144a) ("It is the intention of the Congress of the United States that the provisions of Section 177 of the [Compact] and the [Section 177 Agreement] constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement."); see also Compact § 177(c), 99 Stat. 1812 (Pet. App. 205a) ("[T]he lan-

guage of [the Section 177 Agreement] is incorporated into this Compact.").[3]

The United States and the RMI have subsequently negotiated and adopted amendments to the Compact, see Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720, but the amended Compact expressly states that it "has no effect on * * * Section 177" or on the Section 177 Agreement. § 201(b), 117 Stat. 2808.

2. Petitioners are citizens of the RMI. They seek compensation under the Fifth Amendment's Just Compensation Clause for, *inter alia*, the United States' taking of Bikini and Enewetak Atolls during the nuclear testing program. Petitioners first sought compensation in the early 1980s, when they filed Tucker Act suits in the Court of Claims (*Juda* v. *United States* and *Peter* v. *United States*) on behalf of the inhabitants of Bikini and Enewetak atolls, respectively. Pet. App. 25-28a. Twelve other actions, consolidated under the caption *Nitol* v. *United States*, were filed on behalf of some inhabitants of Rongelap and Utrik and other areas in the Marshall Islands downwind of the test sites. *Id.* at 26a-28a.[4]

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[3] In addition to being an agreement between the United States and the RMI, the Compact has the force of federal law. Compact § 471(c), 99 Stat. 1834 (Pet. App. 247a).

[4] Additionally, thousands of residents of downwind atolls filed suit in the District Court for the District of Columbia pursuant to the Federal Tort Claims Act, seeking damages for personal injuries and death resulting from their exposure to dangerous levels of radiation. *Antolok* v. *United States*, Civil Action No. 83-02471 (D.D.C. June 16, 1987), aff'd, 873 F.2d 369 (D.C. Cir. 1989); see Pet. App. 50a. Micronesian Islanders also filed similar or parallel claims in the Central District of California. *Antolok* v. *Brookhaven Nat'l Labs.*, No. CV 82-2364 (C.D. Cal. Jan. 6, 1988); Pet. App. 101a.

Prior to enactment of the Compact Act, the Claims Court[5] held that the Enewetak plaintiffs' takings claims were barred by the statute of limitations. *Peter* v. *United States*, 6 Cl. Ct. 768, 775 (1984). After the Compact Act became effective, the court dismissed the remaining claims upon the ground that the Compact Act withdrew Tucker Act jurisdiction. *Juda* v. *United States*, 13 Cl. Ct. 667, 689-690 (1987); *Peter* v. *United States*, 13 Cl. Ct. 691, 692 (1987). The Federal Circuit affirmed the dismissal of claims in *Peter* and *Nitol*, adopting the Claims Court's conclusion that the Compact Act withdrew subject matter jurisdiction. *People of Enewetak* v. *United States*, 864 F.2d 134, 136 (1988), cert. denied, 491 U.S. 909 (1989). The court of appeals also dismissed with prejudice an appeal of the *Juda* claimants following the enactment of special legislation appropriating $90 million for the purpose of funding the Resettlement Trust Fund for the people of Bikini. *People of Bikini* v. *United States*, 859 F.2d 1482 (Fed. Cir. 1988).

3. Petitioners subsequently presented their claims to the Nuclear Claims Tribunal established by the RMI pursuant to the Section 177 Agreement. In 2000 and 2001, the tribunal awarded the Enewetak and Bikini petitioners $385.9 million and $563.3 million, respectively. Pet. App. 4a. According to petitioners, the Claims Tribunal has insufficient funds to pay the awards, and the RMI has submitted a "Changed Circum-

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[5] After the cases were filed, Congress transferred the trial functions of the Court of Claims to a newly created United States Claims Court, which has since been renamed the Court of Federal Claims. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 39; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902, 106 Stat. 4516.

stances" petition to Congress for additional appropriations. *Ibid.*[6]

4. In April 2006, petitioners again filed suit against the United States in the Court of Federal Claims, effectively renewing the substance of their earlier claims. Pet. App. 11a; 09-499 Pet. App. 10a. Petitioners also alleged that, by failing to provide funding for the Nuclear Claims Tribunal awards, Congress had deprived petitioners of their property—*viz.*, the Enewetak and Bikini Atolls, as well as their claims before the tribunal—without just compensation, in violation of the Fifth Amendment. Pet. App. 13a; 09-499 Pet. App. 12a. The United States moved to dismiss, arguing principally that the Compact Act withdrew Tucker Act jurisdiction over petitioners' claims. In published decisions dated August 2, 2007, the Court of Federal Claims granted the motions to dismiss. Pet. App. 11a-114a; 09-499 Pet. App. 10a-13a.

5. The court of appeals affirmed. Pet. App. 1a-9a.

The court of appeals held that the Section 177 Agreement settled petitioners' claims and unambiguously withdrew Congress's consent to sue the United States

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[6] In 2007, both Houses of Congress held hearings on the question of additional compensation. See *Republic of the Marshall Islands: Hearing on S. 1756 Before the Senate Comm. on Energy and Natural Resources*, 110th Cong., 1st Sess. (2007); *An Overview of the Compact of Free Association Between the United States and the Republic of the Marshall Islands: Are Changes Needed? Hearing and Briefing Before the Subcomm. on Asia, the Pacific, and the Global Environment of the House Comm. on Foreign Affairs*, 110th Cong., 1st Sess. (2007). As the chairman of the Senate committee recently explained in re-introducing the legislation, changes in administration in both the RMI and the United States have slowed congressional consideration of the RMI's request. 156 Cong. Rec. S54 (daily ed. Jan. 20, 2010) (remarks of Sen. Bingaman); see also S. 2941, 111th Cong., 2d Sess. (2010).

concerning those claims. Pet. App. 7a-8a. Because "[t]he language of the Section 177 Agreement presents no ambiguities whatsoever," the court held, there was no occasion to resolve any ambiguities to avoid constitutional questions. *Id.* at 8a.

The court also noted that petitioners challenged the validity of the Government of the Marshall Islands' espousal and settlement of its citizens' claims. The court held that the challenge to the RMI's capacity to enter into agreements with the United States presented a nonjusticiable political question. Pet. App. 9a (citing *United States* v. *Pink*, 315 U.S. 203, 229 (1942)).

6. Petitioners sought rehearing en banc, which the court denied without recorded dissent. Pet. App. 115a-116a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any precedent of this Court or another court of appeals. The United States and the Marshall Islands settled all claims including the takings claims, and as part of that settlement agreed to preclude further review of those claims in any federal court. The Federal Circuit's application of the straightforward and unambiguous text of the relevant statutory provisions does not warrant further review. And to the extent that petitioners challenge the premise that the Compact settled the claims, they rest on the clearly unavailing theory that Congress and the President could not constitutionally recognize that the Government of the Marshall Islands had the capacity to do so, despite its undertaking to the United States.

1. The court of appeals correctly held that the Compact Act unambiguously withdrew Tucker Act jurisdic-

tion with respect to petitioners' takings claims. That holding does not conflict with any decision of another court of appeals. See *Antolok* v. *United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) ("[In the Compact Act,] Congress could hardly have spoken more explicitly in stripping jurisdiction."). Nor does it conflict with any interpretive principle set out in the decisions of this Court on which petitioners rely: when a statute is unambiguous, the doctrine of constitutional avoidance plays no role in its interpretation. Petitioners insist that there is ambiguity where there is none and the court of appeals discerned none. Petitioners' disagreement with how the courts below read the Section 177 Agreement simply does not warrant further review.

a. As the court of appeals emphasized (Pet. App. 7a), Article X of the Section 177 Agreement, which is entitled "Full Settlement of All Claims," states that the Agreement

> constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, * * * including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including * * * the courts of the United States and its political subdivisions.

Pet. App. 276a-277a. Article XII, entitled "United States Courts," then states:

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such

> claims, and any such claims pending in the courts of the United States shall be dismissed.

Id. at 278a.

Congress reiterated its purpose to withdraw jurisdiction in Title I of the Compact Act, which, *inter alia*, sets forth the legal and policy positions of the United States regarding the Compact. Specifically, Section 103(g)(1) of the Compact Act states that "[i]t is the intention of the Congress" that Section 177 of the Compact and the Section 177 Agreement "constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement." 48 U.S.C. 1903(g)(1) (Pet. App. 144a).

b. Petitioners contend that, pursuant to the doctrine of constitutional avoidance, the Federal Circuit should have interpreted the Compact Act as merely requiring exhaustion of procedures before the Claims Tribunal established by the RMI as a precondition to the subsequent filing of a Tucker Act claim against the United States. See 09-499 Pet. 9-10. But in the face of such unambiguous statutory language, petitioners' reliance on the doctrine of constitutional avoidance is altogether unavailing. The court of appeals acknowledged that constitutional avoidance must be considered in resolving statutory ambiguities, Pet. App. 8a, but it saw no ambiguity in the congressional command that "[n]o court of the United States shall have jurisdiction to entertain such claims." And as this Court has often held, where there is no ambiguity, there is no basis for an alternative construction for the purpose of avoiding an asserted constitutional claim. See, *e.g.*, *Department of HUD* v. *Rucker*, 535 U.S. 125, 134-135 (2002); *Miller* v. *French*,

530 U.S. 327, 341 (2000); see also *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (describing the canon of constitutional avoidance as "a tool for choosing between competing *plausible* interpretations of a statutory text") (emphasis added; citation omitted). Petitioners offer no plausible reading that would allow them to maintain their claims.

First, there is no merit to petitioners' contention (Pet. 19; 09-499 Pet. 11) that claims alleging that the United States is liable for a shortfall in compensation paid by the RMI's Claims Tribunal are not "based upon, aris[ing] out of, or * * * in any way related to" the nuclear testing program conducted in the Marshall Islands. By definition, any claim brought in the Claims Tribunal must meet that same definition, Section 177 Agreement Art. IV, § 1(a) (Pet. App. 271a), and petitioners indisputably sought compensation for the United States' use of Bikini and Enewetak Atolls during the nuclear testing program. Even if petitioners' only contention in this Court were that the United States had taken, without just compensation, the claims they pursued in the Claims Tribunal, that contention still would necessarily "relate[] to" the nuclear testing program. Indeed, petitioners themselves characterize their claim as seeking to recover a "shortfall" in compensation for their underlying claims arising from the nuclear testing program. 09-499 Pet. 8; see *id.* at 9-10.

Second, the Compact Act is not rendered ambiguous by the mere fact that it does not mention the Tucker Act, 28 U.S.C. 1491(a)(1). See 09-499 Pet. 12-14. The Section 177 Agreement does not need to specifically mention a suit against the United States in the Court of Federal Claims, because it specifies that "[*n*]*o court of the United States* shall have jurisdiction to entertain

such claims." Section 177 Agreement Art. XII (Pet. App. 278a) (emphasis added). Nothing in the cases petitioners cite requires a different rule: those cases dealt with general provisions imposing funding caps, limiting "review," and forfeiting "compensation," but *not* purporting to withdraw jurisdiction from any court, including Tucker Act jurisdiction. See *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 127-129 (1974); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Preseault* v. *ICC*, 494 U.S. 1, 12-13 (1990); *Glosemeyer* v. *Missouri-Kan.-Tex. R.R.*, 879 F.2d 316, 324-325 (8th Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Neely* v. *United States*, 546 F.2d 1059, 1064 (3d Cir. 1976). Here, by contrast, there is just such a withdrawal of jurisdiction; there is no need to specify that "[n]o court" includes the Court of Federal Claims. Cf., *e.g.*, *United States* v. *Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1516, 1518 (2008) (explaining that "the language of the relevant statutes," which provides that '[*n*]*o suit* . . . shall be maintained in *any court* for the recovery of'" specified unlawful taxes unless certain procedures are followed, "emphatically covers" constitutional claims brought under the Tucker Act).[7]

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[7] *INS* v. *St. Cyr*, 533 U.S. 289 (2001), is of no help to petitioners here. In that case, this Court held that an immigration statute providing that "no court shall have jurisdiction to review" certain alien removal orders did not withdraw pre-existing habeas corpus jurisdiction in deportation cases. *Id.* at 311-312. The basis for the Court's holding, however, was evidence of "historically distinct meanings" given to judicial "review" and "habeas corpus" proceedings in the immigration context. *Ibid.* Here, by contrast, there is no such ambiguous term in the Section 177 Agreement's command that "[n]o court of the United States shall have jurisdiction to *entertain* such claims." Section 177 Agreement Art. XII (Pet. App. 278a) (emphasis added).

Nor could Article XII "co-exist[]" with the Tucker Act, 07-499 Pet. 12 (citation omitted), without losing all meaning. Article XII prescribes that "[n]o court of the United States shall have jurisdiction to entertain such claims"; petitioners urge that the Court of Federal Claims *should* have jurisdiction to entertain such claims. Those positions are irreconcilable. In *Monsanto*, for instance, the statute that allegedly ousted Tucker Act jurisdiction could readily be interpreted as an exhaustion provision rather than a bar, see 467 U.S. at 1018, and thus to coexist with Tucker Act jurisdiction. Here, by contrast, reading Article XII to impose only an exhaustion requirement would undo the finality of the "full and final settlement" ratified by Congress.

The implausibility of petitioners' reading is made all the clearer by the role of the RMI's Claims Tribunal under the Compact and the Section 177 Agreement. Congress did not create the Claims Tribunal or agree to pay its awards in full. To the contrary, the Claims Tribunal was created by act of the Nitijela—the legislative body of the RMI—"[i]n furtherance of the desire of the Government of the Marshall Islands to provide an additional long- term means for compensating claims resulting from the Nuclear Testing Program." Section 177 Agreement Art. IV (Pet. App. 270a-271a); see Pet. App. 52a. Claims Tribunal awards are to be paid by the RMI from a fund established from a portion of the $150 million settlement proceeds. Section 177 Agreement Art. II, § 6(c) (Pet. App. 267a). The United States does not participate in those proceedings, which are internal to the RMI; indeed, the tribunal has "no jurisdiction over the United States * * * with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program."

Id. Art. IV, § 1(a) (Pet. App. 271a). The role of the Claims Tribunal is therefore akin to that of the Foreign Claims Settlement Commission in the United States, which considers claims of the United States citizens to facilitate the pro rata distribution of funds the United States might received in a lump-sum settlement with a foreign government. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 680-681 (1981). The RMI's Claims Tribunal therefore cannot plausibly be regarded as a forum for exhausting claims against the United States, as simply one step before a return to the Court of Federal Claims for a suit under the Tucker Act.

The Compact, the Compact Act, and the Section 177 Agreement cannot be read to give the tribunal the task of adjudicating monetary liability on the part of the United States. The United States "fulfill[ed] * * * its obligations under Section 177 of the Compact" by paying the $150 million settlement amount to the Marshall Islands. *Id.* Art. I, § 1 (Pet. App. 262a). Petitioners make no allegation that the United States failed to fund the Claims Tribunal as it agreed to do.

c. Of course, legislative history could not detract from the plain language of Article XII, but in any event petitioners are incorrect in their contention that "nothing in the legislative history of Section 177 evidences Congress's intent affirmatively to prevent a Tucker Act claim as a constitutional backstop to the Tribunal process." 09-499 Pet. 14. In approving the Compact Act in 1985, the House Committee on Foreign Affairs explained in relevant part:

> A number of lawsuits have been lodged against the United States Government by individuals from various islands in the Marshalls, seeking approximately $5 billion in damages stemming from our nu-

clear weapons testing program. With the exception of the Bikini rehabilitation lawsuit, none of these suits have been resolved yet.

Section 177 of the compact provides for a *comprehensive settlement* of *all of these lawsuits* and *any future claims against the United States*. Under the terms of this provision, the United States Government will provide the Government of the Marshall Islands with a $150 million trust fund as just, adequate, and *full settlement of all claims against the United States* and its agents in regard to the Marshall Islands and its citizens resulting from the nuclear weapons testing program. The Government of the Marshall Islands will espouse and settle these claims *and foreclose all further adjudication of them in the courts of the United States*.

H.R. Rep. No. 188, 99th Cong., 1st Sess., Pt. 1, at 8 (1985) (emphasis added). Thus, Congress was well aware when it provided that "any such claims pending in the courts of the United States shall be dismissed," Section 177 Agreement Art. XII (Pet. App. 278a), that it was directing the dismissal of claims under the Tucker Act. See p. 5, *supra*.

2. Petitioners are likewise incorrect in their contention that the court of appeals erroneously rejected their constitutional arguments. Indeed, the court of appeals did not need to discuss those constitutional arguments at any length at all, because of the unique fact that separates this case from all of those petitioners cite: petitioners' claims were settled. Indeed, the jurisdictional provision that controls this case was a part of the settlement agreement. By contrast, every case petitioners cite involved *live* takings claims.

Thus, before this Court could even reach the constitutional claims petitioners press here, it would have to agree with petitioners on the threshold argument that the RMI did not validly espouse and settle its citizens' claims. See Pet. 22-24; 09-499 Pet. 19. Even if this Court's precedents permitted judicial review of that question (which they do not, as the court of appeals correctly recognized), petitioners' arguments about the RMI's capacity to carry out its commitment in the Compact and the Section 177 Agreement are not well taken. No further review of those issues is warranted.

a. The Compact recognizes the self-determination of the Marshallese people. See Compact preamble, 99 Stat. 1800 (Pet. App. 181a). Indeed, before the Compact was ever presented to Congress, the Marshallese people had considered it and approved it by plebiscite. At the time Congress acted, therefore, the people of the Marshall Islands had formed a body politic that was capable of treating with the United States. The Compact is phrased in just such terms. *Ibid.*[8] Moreover, the Compact's Section 177 Agreement, which effected the espousal, was negotiated and executed by Marshall Islands representatives on behalf of their government, and countersigned by a United States Ambassador appointed by President Reagan. See Section 177 Agreement, Hein's No. KAV 4575, at xviii; see also Pet. App.

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[8] It has long been recognized that Trust Territory inhabitants were not United States citizens, and that the Trust Territory was not part of the sovereign territory of the United States. See *Porter* v. *United States*, 496 F.2d 583, 587-590 & n.4 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975); see also Trusteeship Agreement Art. 11(1), 61 Stat. 3304, 8 U.N.T.S. 196 (Pet. App. 287a) (the United States "shall take the necessary steps to provide the status of citizenship *of the trust territory* for the inhabitants of the trust territory") (emphasis added).

248a; Arthur J. Armstrong & Howard L. Hills, *The Negotiations for the Future Political Status of Micronesia (1980-1984)*, 78 Am. J. Int'l L. 484 (1984). And the principle that one sovereign may espouse and settle claims by its nationals against another sovereign is well established, as petitioners acknowledge. Pet. 24 n.8; *Dames & Moore*, 453 U.S. at 679 (agreements between nations "settling the claims of their respective nationals" are "'established international practice'") (quoting Louis Henkin, *Foreign Affairs and the Constitution* 262 (1972)).

In entering into the Compact and the Section 177 Agreement, the political Branches necessarily agreed that the Government of the Marshall Islands possessed the authority to espouse and settle the claims of its nationals. See Compact § 471(a), 99 Stat. 1834 (Pet. App. 246a) ("The Government of the United States and the Government[] of the Marshall Islands * * * agree that they have full authority under their respective Constitutions to enter into this Compact and its related agreements and to fulfill all of their respective responsibilities in accordance with the terms of this Compact and its related agreements."). That determination is not subject to the sort of judicial second-guessing that petitioners invite.[9]

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[9] The Bikini petitioners contend, for instance, that the Government of the Marshall Islands lacked capacity to espouse and settle their claims without *their* express participation. 09-499 Pet. 19. The legal basis for that assertion is unclear, and indeed, the Bikini petitioners disavowed any such argument in the court of appeals. See 2007-5175 Pet. C.A. Reply Br. 19 ("[T]he government * * * insist[s] that the Bikinians' claim is a challenge to the United States' recognition of the Marshall Islands government and the purported espousal of the Bikinians' claim. *But the Bikinians are making no such argument.*") (emphasis added; citation omitted). In any event, the people of the

Because petitioners challenge the very capacity of the United States' compacting partner to carry out the Compact, their challenge is not justiciable. Such a challenge goes far beyond the traditional judicial function of *interpreting* a treaty, as in the cases petitioners cite (Pet. 29). Rather, petitioners' argument amounts to a "disapproval or non-recognition" of not only the espousal, but also the United States' agreement to recognize the Government of the Marshall Islands as having the capacity to espouse and settle claims of its citizens. *United States* v. *Pink*, 315 U.S. 203, 232 (1942). As the court of appeals observed, these types of recognition, political, and policy questions are excluded from judicial review. See *id.* at 229-232 ("Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.") (citing *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937)).[10]

Similarly, in *Doe* v. *Braden*, 57 U.S. (16 How.) 635 (1854), this Court upheld and applied a provision of the 1819 treaty of cession (and an attached declaration) expressly invalidating several grants that the King of Spain had made, while the treaty negotiations were underway, of lands later ceded by the treaty. Although the

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Marshall Islands themselves approved by plebiscite the Compact provision authorizing the settlement of "all such claims."

[10] In *Pink*, this Court held the political question doctrine barred judicial review of the claims of foreign creditors who challenged the Soviet Government's nationalization of Russian property, an act that "the United States by its policy of recognition agreed no longer to question." 315 U.S. at 231. So too here: petitioners challenge the Government of the Marshall Islands' espousal, reflected in the Compact and the Section 177 Agreement, an act that the United States, under its policy of recognition, likewise acknowledged and accepted.

Spanish grantees' successors contended that the King lacked power to agree to extinguish their rights in that manner, this Court explained that it would not second-guess the political Branches' exercise of the powers to recognize nations and make treaties, and thus would not examine the competence of the United States' treaty partner to make the agreement. *Id.* at 657-658.

b. Petitioners assert that a different rule should apply here, on the theory that before it entered into the Compact, the Marshall Islands lacked the capacity to espouse their claims because it was not a sovereign government but, rather, was under the United States' authority and control. Pet. 23-27; 09-499 Pet. 19.[11] That contention is at odds with the Compact itself, which explains that the Marshall Islands negotiated and entered into the Compact to establish a "government-to-government relationship[]" with the United States. Compact preamble, 99 Stat. 1800 (Pet. App. 181a).

The Marshall Islands had adopted a constitution and negotiated a compact of free association, and the United Nations Trusteeship Council had approved the termination of its trusteeship status. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986); T.C. Res. 2183, U.N. Doc. T/RES/2183 (May 28, 1986).[12] Thus, petitioners would have to establish that a trust territory in that position may not, in negotiating the compact by which it leaves trust-territory status, espouse the claims of its citizens as any other sovereign can, even though the espousal

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[11] Indeed, the Enewetak petitioners concede that if the Government of the Marshall Islands was a sovereign government for these purposes, it could espouse and settle its citizens' claims against another sovereign. Pet. 24 n.8.

[12] The Security Council later ratified the Trusteeship Council's recommendation. S.C. Res. 683, U.N. Doc. S/RES/683 (Dec. 22, 1990).

takes effect only once the compact itself becomes effective, the former territory is confirmed as "self-governing" with "the capacity to conduct foreign affairs," Compact §§ 111, 121(a), 99 Stat. 1801, and the United States formally recognizes the nation's new status, see Proclamation No. 5564, 51 Fed. Reg. at 40,400. Petitioners cite nothing to support their contention that the Constitution prohibits the political Branches from recognizing an espousal and settlement of claims in those circumstances—and accepting that contention would greatly undermine the ability of the United States to provide for the full independence of a trust territory through a process of negotiation with the representatives of the duly constituted government of that territory.

In any event, petitioners offer no reason why this Court's review would be warranted to consider the status of the Marshall Islands before the 1986 Compact. That question lacks recurring significance. Indeed, there are no more United States trusteeships; the last remaining United States trust territory, Palau, became independent in 1994. Proclamation No. 6726, 59 Fed. Reg. 49,777 (1994).

c. Finally, contrary to petitioners' assertion, the Federal Circuit's decision does not conflict with this Court's decision in *Dames & Moore*. Petitioners seize upon the Court's statement that, "to the extent [Dames & Moore] believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Dames & Moore*, 453 U.S. at 689-690; see Pet. 28. The Court made that statement, however, in reference to the so-called "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. 1502, not to the political question

doctrine. See *Dames & Moore*, 453 U.S. at 689. Moreover, *Dames & Moore* did not present, as here, an issue respecting a foreign government's capacity to espouse claims, or the United States' recognition of that authority.

3. Petitioners argue that the Federal Circuit's decision conflicts with decisions of this Court and other circuits holding that the Just Compensation Clause is "self-executing." In this regard, petitioners maintain that claims for just compensation are self-executing, that they are vested within the jurisdiction of the federal courts by the force of the Just Compensation Clause, and that such jurisdiction is not dependent upon, and cannot be foreclosed by, any congressional enactment. According to petitioners, the Federal Circuit's decision permits Congress to evade its constitutional duty to pay just compensation by holding that Congress may create an exclusive, alternate tribunal to decide just compensation claims, but refuse to pay fully the awards of the alternate forum. Pet. 13-16, 09-499 Pet. 16-21. Petitioners' contention lacks merit and does not warrant further review.

a. The Federal Circuit did not address the scenario petitioners spin out. Rather, the court held that, as part of its ratification of the Compact and settlement of all claims, Congress unambiguously withdrew jurisdiction pursuant to the claims settlement. Pet. App. 6a-8a. Petitioners offer no reason why Congress cannot, within the bounds of the Just Compensation Clause, withdraw Tucker Act jurisdiction over a class of claims that have been fully and finally settled. To the contrary, petitioners acknowledged in the proceedings below that "[w]ithdrawing jurisdiction over claims that have been validly settled and released is perfectly constitutional." 2007-

5175 C.A. App. A1000-A1002; accord 2007-5176 C.A. App. A428. That concession alone warrants denial of the petitions.

At bottom, the Federal Circuit correctly recognized that this case involves a foreign country that has espoused and settled its nationals' claims in the context of an international compact. The Compact withdraws federal jurisdiction in clear terms and, instead, authorizes the independent government of the RMI to petition Congress for additional relief on behalf of its citizens. The RMI has done so, and its request is pending before Congress, the appropriate interlocutor. See note 6, *supra*.

For those reasons, even if the statutes here were ambiguous, there simply is no substantial constitutional question that would justify imposing a saving construction. Whether or not the Government of the Marshall Islands lacked the capacity to espouse claims, the fact remains that Congress has withdrawn federal jurisdiction based upon its determination that the Compact effected a "full and final settlement." And that settlement involved the provision of a substantial sum of money for a number of purposes, including compensation of those with outstanding claims. This case therefore does not present a situation like that in the *Regional Rail Reorganization Act Cases*, in which the only compensation offered under the challenged statute—*i.e.*, common stock in an "unproved entity" of highly questionable value, perhaps zero (419 U.S. at 137 & n.21)—was coupled with Congress's apparent determination that it would not appropriate any funds "beyond those expressly committed by the Act." *Id.* at 127.

b. Although the question is not presented here, there is no merit to petitioners' assertion that Congress is powerless to withdraw Federal court jurisdiction with

respect to suits for just compensation. Petitioners correctly note that the Just Compensation Clause's "self-executing" character means that the clause itself provides a substantive right to compensation where the government has taken property. The existence of that substantive right, however, does not prevent Congress from withdrawing its consent to suit in the Tucker Act. Congress may decline to waive the sovereign immunity of the United States, or may withdraw consent to suit that was previously given, even if the underlying claim may be one of constitutional dimension. See *Lynch* v. *United States*, 292 U.S. 571, 581 (1934); *Antolok*, 873 F.2d at 373-375.[13]

Had Congress chosen to do so, it could constitutionally have enacted only the withdrawal of consent for petitioners to sue the United States, while otherwise leaving their underlying claims unaffected and making no *advance* legislative provision for their ultimate resolution. It follows that Congress' action here is not rendered unconstitutional by virtue of the facts that the same Act of Congress that withdrew Tucker Act jurisdiction also approved a settlement of the claims and provided for a lump-sum payment of $150 million for those and other purposes, and that, in the Section 177 Agreement, the Government of the Marshall Islands also un-

[13] Prior to the enactment of the Tucker Act in 1887, Congress had not waived the sovereign immunity of the United States with respect to suits for just compensation. See *Langford* v. *United States*, 101 U.S. 341, 343 (1880). Consequently, plaintiffs whose property had allegedly been taken by the Government for public use were constrained to pursue relief directly from Congress or in the courts under alternate legal theories—for example, by seeking possession of the property through a suit for ejectment against a Government official, rather than bringing a suit against the United States itself. *E.g.*, *United States* v. *Lee*, 106 U.S. 196, 218-223 (1882).

dertook to establish its own claims tribunal mechanism to decide the amount of compensation that, in its assessment, should be paid for injuries resulting from the nuclear testing program.

c. There is likewise no merit to the Bikini petitioners' contention (09-499 Pet. 14-21) that the Federal Circuit's decision conflicts with prior decisions holding that a Tucker Act remedy "cannot be defeated by congressional design." In *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948), the Second Circuit did not address a withdrawal by Congress of the consent to sue the United States; rather, the case involved a dispute between private parties to recover overtime pay in accordance with the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* In *Wisconsin Central Ltd.* v. *Public Service Comm'n*, 95 F.3d 1359 (7th Cir. 1996), a suit seeking declaratory and injunctive relief against rules regarding conditions required for utilities to place transmission facilities across railroad rights-of-way, the Seventh Circuit generally observed that "[t]he just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy." *Id.* at 1368. As in *Battaglia*, the court did not address a withdrawal by Congress of its consent to sue the United States under the Tucker Act. Accordingly, there is no conflict between those decisions and this one.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010

No. 09-498 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

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Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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The Federal Circuit, at least, when it refused jurisdiction over this case, "observe[d] that its sense of justice, of course, makes it difficult to turn away from a case of constitutional dimension." Pet. App. 9a. But the government, it seems, has no such qualms; it sees no constitutional issue in this case at all. In its view, the United States may deprive persons of their property for decades and then get away without paying compensation by foisting the problem onto another government that has no money to pay and that supposedly waived the property owners' right to sue the United States in court.

For more than sixty years, the government has played a shell game with the constitutional rights of the People of Enewetak, who have patiently pursued every possible remedy afforded by our system of justice. The government first promised petitioners that they would be accorded the constitutional rights of U.S. citizens.[1] It then removed petitioners from their property, promising they would be returned "someday." When petitioners sought compensation in the courts for the loss of their property, the government strenuously resisted their efforts to do so. Then, when it created the largely (but not entirely) self-governing Republic of the Marshall Islands, the United States solemnly acknowledged *its own* obligation to provide compensation,[2] but required that petitioners proceed through a special tribunal rather than the courts. Now that the tribunal has

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[1] *See* Pet. 16-17 n.5.

[2] "The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands ... for loss or damage to property and person of the citizens of the Marshall Islands[.]" Compact § 177(a) (Pet. App. 204a).

ruled that petitioners are entitled to compensation, the government says that actually paying is someone else's problem, and that, when it created the Republic of the Marshall Islands, the government of the United States effectively washed its hands of the whole affair.

This repudiation of the fundamental constitutional obligation to pay just compensation for the taking of private property is "hardly worthy of our great government."[3] This particular case may involve people and property in our Nation's peripheral vision, but there should be no mistaking what is at stake. If the government is correct that it can insulate itself from its constitutional obligation to pay just compensation simply by closing the doors of its courts, then the constitutional right to just compensation is insecure indeed.

I. CONGRESS MAY NOT BAR JURISDICTION OVER PETITIONERS' TAKINGS CLAIMS

1. The government does not deny, nor can it, that petitioners have thus far received grossly inadequate compensation for the deprivation and destruction of their property.[4] Although Congress may require pri-

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[3] *See Bayer* v. *United States Dep't of Treasury*, 956 F.2d 330, 335 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (quoting *Brandt* v. *Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

[4] The government also notably does not argue that petitioners are not protected by the Just Compensation Clause of the Fifth Amendment. Although the government states that "[p]etitioners are citizens of [the Republic of the Marshall Islands]" (Opp. 5) and that "Trust Territory inhabitants were not United States citizens" (Opp. 16 n.8), it nowhere denies that at least *some* petitioners have U.S. citizenship and that Trust Territory residents were U.S. *nationals* entitled to the constitutional right of just compensation (Pet. 16-17 n.5).

vate property owners to pursue alternative compensation remedies before turning to the courts, petitioners have done so but have obtained next to nothing for the loss of their land. There is also no prospect at present that the government will provide petitioners with any (much less just) compensation outside the court system.

In these circumstances, petitioners have a right to return to the courts. This Court has repeatedly stated that Congress may not evade the obligation to pay just compensation by closing the courts or manipulating the remedy that is available. "The just compensation clause may not be evaded or impaired by *any form* of legislation." *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 368 (1936) (emphasis added); *see* Pet. 13-15. Moreover, this Court has expressed "grave doubts" about reading a statute so as to deprive property owners of a judicial remedy to challenge the adequacy of compensation established by a special statutory process. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134, 139 & n.24 (1974). To avoid the constitutional violation that would result if petitioners were denied their just compensation remedy altogether, the Section 177 Agreement should not be read to close the courts to petitioners; but if it is so read, then the Agreement is unconstitutional as applied here, where the result would be to deny petitioners compensation.

The government suggests (Opp. 22-23) that, even where (as here) it does have a constitutional obligation of just compensation, the Constitution does not require that such obligation be enforced through the courts under the Tucker Act. But it surely must be enforceable *some* way, and the Tucker Act was enacted precisely

for situations like the present one, where the government *will not pay* for the property it has taken.[5] Indeed, if access to the courts for a compensation remedy did not have a constitutional dimension, then it is difficult to see why this Court would have cautioned against interpreting statutes to preclude a Tucker Act remedy. *See Preseault* v. *ICC*, 494 U.S. 1, 14 (1990) (requiring a "clear and unmistakable" intent to withdraw jurisdiction). If Congress had enacted adequate provision for petitioners' compensation, then access to the courts might not have been necessary, but Congress did not, and it is for that reason that the courts remain open.[6]

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[5] *See Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893) ("The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.").

[6] In suggesting that a judicial remedy is not required to ensure just compensation when the government does not willingly pay, the government misreads *Langford* v. *United States*, 101 U.S. 341 (1880). That case held only that the jurisdiction of the Court of Claims did not then extend to cases where the government did *not* act as though it were taking private property for its own use, but rather asserted its own prior and superior title—in effect, the Court of Claims could not hear quiet-title cases against the United States. But this Court specifically declined to hold there that the Court of Claims could not entertain just compensation claims based on a professed taking of private property, *see id.* at 344, and in *Great Falls* the Court held that it could—three years before the Tucker Act was enacted. *See United* States v. *Great Falls Mfg. Co.*, 112 U.S. 645, 656-658 (1884). In any event, as the government concedes (Opp. 23 n.13), property owners could at that time bring injunctive claims against federal officers to force the government to bring an eminent domain action to recover for the uncompensated taking of private property. *See United States* v. *Lee*, 106 U.S. 196, 220-221 (1882).

The issue in this case is not whether Congress may establish a non-judicial forum to assess compensation in the first instance. Such alternate forums are permissible, if they ensure "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. at 124-125 (internal quotation marks omitted). Here, that alternate forum has been tried and found utterly wanting, yet still the government refuses to pay. Under these circumstances, the courts remain open as a matter of the "constitutional duty of the government, as well as [of] common justice," to ensure compensation. *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884); *see First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 315 (1987).

2. The Federal Circuit incorrectly concluded that saving constructions of the contested language of the Section 177 Agreement could not be considered. In so doing, the Federal Circuit deviated from the settled principle of reading statutes to avoid, rather than create, a constitutional doubt.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This rule applies with particular force to statutes arguably withdrawing Tucker Act jurisdiction over just compensation claims. Only "an unambiguous intention to withdraw the Tucker Act remedy" will suffice. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019 (1984).

The pertinent language here is not so unambiguous as to preclude an interpretation avoiding the grave constitutional questions that would arise from denying petitioners any forum for their constitutional claims. *See* Pet. 18-19. Indeed, the Federal Circuit itself, when it first had occasion to review that language, recognized that judicial intervention might become necessary should the Nuclear Claims Tribunal (NCT) fail to provide adequate compensation. *See People of Enewetak* v. *United States*, 864 F.2d 134, 136 (Fed. Cir. 1988); *see also Antolok* v. *United States*, 873 F.2d 369, 378 (D.C. Cir. 1989). Likewise, Chief Judge Wald concluded that such language did not demonstrate an unambiguous intent to withdraw federal court jurisdiction. *See Antolok*, 873 F.2d at 395 (Wald, C.J., concurring). The courts thus recognized that petitioners might well have judicially cognizable takings claims should the NCT process be proven inadequate, as in fact happened. The government identifies no explicit withdrawal of jurisdiction over *those* claims that the courts somehow missed when petitioners' takings claims were first diverted into the NCT process.

II. THE FEDERAL CIRCUIT'S RELIANCE ON A PURPORTED "SETTLEMENT" RAISES CONSTITUTIONAL ISSUES INSTEAD OF RESOLVING THEM

1. The government contends that no serious constitutional issue is presented here because the Enewetak people's claims were "settled." Opp. 15. It further argues that the authority of the government of the Marshall Islands (before independence) to settle petitioners' claims constitutes a nonjusticiable political question. Far from rendering this case cut and dry, the Federal Circuit's (and the government's) adoption of this position raises another serious constitutional issue:

may a governmental entity subordinate to the United States "settle" or "waive" individuals' constitutional claims against the United States, without their express consent? Whatever the answer, the question is surely susceptible of, and appropriate for, a judicial resolution.[7]

The government does not suggest that the Marshall Islands was a sovereign foreign country when the Compact was negotiated. Although the Marshall Islands had a popularly elected government at that time that was competent to enter into agreements with the United States—as remains true of the fifty States, the District of Columbia, and the Territories—it remained under the control of the United States as part of the Trust Territory of the Pacific Islands, for which "all executive, legislative, and judicial authority" was "vested in such person or persons and ... exercised ... through such agency or agencies as the President of the United States may direct or authorize." 48 U.S.C. § 1681(a). Indeed, at that time, if a Marshall Islands resident had a claim against a *foreign* nation, responsibility for espousing it was vested in the government of the *United States*. *See* Pet. App. 287a.

This case therefore does not involve any question about the political branches' recognition of the official representative of a *foreign* nation. Likewise, it does not raise the question whether the political branches

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[7] The government observes that the Compact of Free Association was approved by plebiscite in the Marshall Islands (Opp. 2), but the Section 177 Agreement was never put up to a popular vote, and in any event, "constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-737 (1964).

can make the determination to accept a foreign government's assertion that it has authority to take particular actions under its own law—the issue raised in *Doe* v. *Braden*, 57 U.S. (16 How.) 635 (1854). Rather, the issue here is whether the courts must accept the government's assertion that the constitutional claims of private individuals can be validly "settled" not by the claimants themselves but by an entity that is not sovereign, but is under U.S. government control.

The courts' deference to the political branches is not so sweeping in scope. The act of state doctrine—which requires the courts to accept the validity of a foreign government's acts, such as the Soviet nationalizations at issue in *United States* v. *Pink*, 315 U.S. 203 (1942), and the land grant annulments by the King of Spain at issue in *Doe* v. *Braden*—has never been applied to the acts of governments that are not foreign. Likewise, deference to the political branches' decisions about the foreign representatives with whom they will treat does not give the United States carte blanche to treat any entity as if it were a foreign sovereign. Clearly, the validity of an agreement, however labeled, between the United States and California purporting to "espouse" and "settle" Californians' claims against the United States would not constitute a political question. Nor would the courts decline to scrutinize the validity of an agreement between the United States and a foreign corporation that purported to waive its employees' individual claims against the United States—even if the agreement were called a "treaty" or an "espousal" and signed by a U.S. Ambassador. The government's *characterization* of an agreement and its counterparty cannot create a obstacle to judicial review.

2. On the underlying question whether the Marshall Islands government could "settle" petitioners'

constitutional just compensation claims against the United States without their express consent, the answer must be, and is, negative. A party to litigation may not have its claim disposed of by any other party. *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986). And although a governmental entity litigating in a *parens patriae* capacity can dispose of its citizens' "common *public* rights," *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958) (emphasis added), this Court has never held that even a sovereign government may negotiate away individual rights to seek redress in the courts of the United States for constitutional violations—much less when those violations occurred when the individuals were nationals of the United States.

The Section 177 Agreement, however it be read, cannot alter the fundamental principle that "[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 304 (1923). That constitutional obligation does not disappear in a claims-settlement context. In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court explained that parties whose claims in U.S. courts were diverted into the Iran-U.S. Claims Tribunal under the claims-settlement provisions of the Algiers Accords would nonetheless retain a Tucker Act remedy following their exhaustion of the Tribunal process should the compensation received there prove constitutionally deficient. As the Court stated, "to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States

Court of Claims under the Tucker Act." *Id.* at 689-690; *see also id.* at 691 (Powell, J., concurring).[8] Here too, the courts remain open to petitioners' takings claims, notwithstanding the government's attempt to "settle" them away for next to nothing.

* * * * *

Justice Holmes once remarked that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R.R. Co.* v. *United States*, 254 U.S. 141, 143 (1920). But as Justice Jackson observed, "there is no reason why the square corners should constitute a one-way street." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 388 (1947) (dissenting). Petitioners have done what the government demanded of them and more: they left their home islands for decades and relied on the government's promise to return them to their property; they pursued their compensation claims in the courts; when Congress established an

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[8] The government suggests (Opp. 20-21) that in *Dames & Moore* the Court merely rejected the contention that the "treaty exception" to the Court of Claims' jurisdiction would bar any such action. The Court addressed that issue, however, only after making clear that the question of the availability of a Tucker Act remedy was ripe for review because of the constitutional imperative of a clear and certain judicial remedy at the time the taking was effected. *See* 453 U.S. at 689. Thus, the treaty-exception issue was addressed (and rejected) as a possible concern that a certain judicial remedy might not be available should the claimants eventually conclude that the Iran-U.S. Claims Tribunal had not provided them adequate compensation for their claims. Had the Tucker Act remedy been withdrawn, the case for invalidating the Algiers Accords, on the ground that they provided no ultimate assurance of just compensation for claims that were taken, would have been much stronger.

alternate remedy, they pursued that avenue of relief; and then they patiently waited for their compensation to be paid. They trusted the system to make them whole, but the government has paid them virtually nothing. This Court should grant review to make clear that the government's obligation to pay just compensation for property that it takes is real, and not insubstantial, for "[m]en naturally trust in their government, and ought to do so, and they ought not to suffer for it." *Menges* v. *Dentler*, 33 Pa. 495, 500 (1859).

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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